92-1190

No. 92-1190

Supreme Court, U.S.
FILED
JAN 13 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RECEIVED
HAND DELIVERED
JAN 13 1993
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ALAN F. GERSMAN, *et al.*,
Petitioners

v.

GROUP HEALTH ASSOCIATION, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID H. SHAPIRO
DOUGLAS B. HURON *
MICHAEL J. KATOR
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005
(202) 898-4800

* Counsel of Record

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

123 pp

QUESTION PRESENTED

Whether Section 101 of the Civil Rights Act of 1991, which was enacted to overrule this Court's decision in *Patterson v. McLean Credit Union*, applies in a case that arose before *Patterson* and that was pending when the 1991 Act became law.

PARTIES TO THE PROCEEDING

Petitioners are Alan F. Gersman and Computer Security International, Inc., a corporation of which Mr. Gersman is president and principal shareholder. Respondent is Group Health Association, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	62a
APPENDIX C	63a
APPENDIX D	89a
APPENDIX E	100a

TABLE OF AUTHORITIES

CASES — Page

Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *vacated and remanded on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992) 9, 11
Banks v. Chesapeake & Potomac Telephone Co., 802 F.2d 1416 (D.C. Cir. 1986) 3
Baynes v. A.T.&T. Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) 6
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) ..... *passim*
Bradley v. Richmond School Board, 416 U.S. 696 (1974) ..... *passim*
Butts v. City of New York (2d Cir. No. 92-7850) .. 7
Cannon v. University of Chicago, 441 U.S. 677 (1979) 7
City of Mobile v. Bolden, 446 U.S. 55 (1980) 12
Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) 6
FDIC v. Wright, 942 F.2d 1089 (7th Cir.), *cert. denied*, 112 S. Ct. 1937 (1992) 9
Fortenot v. Louisiana Board of Elem. & Security Educ., 805 F.2d 1222 (5th Cir. 1986) 11
Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 6
Grove City College v. Bell, 465 U.S. 555 (1984) 11
Hicks v. Brown Group, Inc., —— F.2d ——, 1992 WL 384862 (8th Cir. Dec. 30, 1992) (*en banc*) 6
Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992) 6
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) ..... *passim*
Kuhn v. Island Creek Coal Co., 974 F.2d 1338 (6th Cir. 1992) (table) 6
Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992) 6
Luddington v. Indiana Bell Telephone Co., 966 F.2d 225 (7th Cir. 1992) 6

TABLE OF AUTHORITIES—Continued

	Page
Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990)	11
Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992)	6
Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987)	11
Patterson v. McLean Credit Union, 491 U.S. 164 (1989)	*passim*
Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986)	4
Patterson v. McLean Credit Union (4th Cir. No. 92-1376)	7
Reding v. FDIC, 942 F.2d 1254 (8th Cir. 1991)	9
Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987)	3
Sinnovich v. Port Authority of Allegheny County (3d Cir. No. 92-3125)	7
Smith v. Robinson, 468 U.S. 922 (1984)	11
St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987)	3
United States ex rel. McCoy v. California Medical Review, Inc., 723 F. Supp. 1363 (N.D. Cal. 1989)	10
United States v. Marengo County Commission, 731 F.2d 1546 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984)	11
United States v. Rockwell International Corp., 730 F. Supp. 1031 (D.Colo. 1990)	10
Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992)	6

STATUTES

42 U.S.C. § 1981	*passim*
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)	*passim*
Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988)	11
False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3154 (1986)	9

TABLE OF AUTHORITIES—Continued

Page

Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) 9
Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986) 11
Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982) 12

LEGISLATIVE HISTORY

137 Cong. Rec. H 3897 (June 4, 1991) 11
137 Cong. Rec. S 15325 (October 29, 1991) 8
137 Cong. Rec. S 15483 (October 30, 1991) 8
137 Cong. Rec. S 15485 (October 30, 1991) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ———

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 975 F.2d 886 (App. A). The district court's opinion is reported at 725 F. Supp. 573 (App. D). The original decision of the court below, whose judgment was vacated by this Court last Term, 112 S. Ct. 960 (App. B), is reported at 931 F.2d 1565 (App. C), *reh'g denied* (App. E).

JURISDICTION

This is a petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The court below issued its decision affirming the district court on September 15, 1992. On November 25, 1992, Chief Justice Rehnquist enlarged the time within which petitioners could file this petition to January 13, 1993. Accordingly, this petition is submitted within the time allowed by law. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 101(2)(b) of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), provides:

> For purposes of [42 U.S.C. § 1981], the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

Section 402(a) of the Civil Rights Act of 1991 provides:

> Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

STATEMENT

Petitioners are Computer Security International, Inc. (CSI), a corporation engaged in the provision of off-site data storage for information intensive businesses in the Washington metropolitan area, and its president and principal shareholder, Alan Gersman. In 1983, CSI entered into a service agreement with Group Health Association, Inc. (GHA) to provide information storage and retrieval services for a one-year period. The contract provided for month-to-month renewal after the initial one-year term expired.

CSI enjoyed a mutually satisfactory commercial relationship with GHA through the first contract year and

for three years thereafter. In the fall of 1987, however, this relationship changed dramatically when Adel Nakla, at the direction of Mohammed Ghafori (the recently hired manager of GHA's Management Information Systems division), asked Mr. Gersman a simple question:

Are you a Jew?

Mr. Gersman is Jewish, and he so told Mr. Nakla.

Immediately after this encounter, Mr. Gersman began to hear rumors that GHA was dissatisfied with CSI's performance. Then, in October 1987, GHA severed its contractual relationship with CSI and awarded the service agreement to another vendor, one that was not, however, owned and operated by "a Jew." GHA's refusal to continue doing business with CSI was motivated solely by Mohammed Ghafori's bigotry towards Jews.

When the contractual relationship between CSI and GHA ended in October 1987, it was clear that 42 U.S.C. § 1981—which bans discrimination in the making and enforcement of contracts—protected individuals of various ethnic backgrounds, including Jews. *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987). There was also no question at that time that § 1981 reached contract terminations. *E.g., Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986) (holding that a termination claim under § 1981 is subject to a three-year statute of limitations in the District of Columbia).

It was against this background that petitioners sued GHA in district court, alleging among other things that GHA's decision to terminate its contractual relationship with CSI violated 42 U.S.C. § 1981. While the case was pending, this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *Patterson* itself considered only whether § 1981 reached harassment on the job, but

the Court's broad holding—that the statute did not cover conduct after the formation of a contract—indicated for the first time that § 1981 would not be read to cover contract terminations.[1]

GHA seized on *Patterson* and asked the district court to apply it here. The court then dismissed petitioners' claims, holding that petitioners lacked standing to sue and that, in any event, *Patterson* barred their claim for relief under § 1981 (App. 89a-99a). The court of appeals reversed the district court's conclusion that CSI lacked standing, but in a divided opinion affirmed its holding that *Patterson* precluded any relief under § 1981 (App. 63a-88a).

While petitioners' original petition for certiorari was pending, Congress enacted the Civil Rights Act of 1991. Section 101 of the Act amended 42 U.S.C. § 1981 to negate *Patterson* by confirming among other things that § 1981 covers contract terminations. On January 27, 1992 this Court granted the writ of certiorari, vacated the court of appeals' judgment and remanded this case "for further consideration in light of the Civil Rights Act of 1991" (App. 62a).

On remand to the D.C. Circuit, the parties briefed and argued the question of the retroactive application of Section 101 of the Act. The court below, over the dissent of Judge Wald, held that Section 101 did not apply to cases pending upon enactment of the Civil Rights Act of 1991. Accordingly, the court of appeals affirmed its previous decision dismissing petitioners' claims (App. 1a-61a). This petition timely followed.

---

[1] Even the Fourth Circuit in *Patterson* itself, which initially held that § 1981 did not reach harassment, said that "[c]laims of racially discriminatory hiring, *firing*, and promotion go to the very existence and nature of the employment contract and thus fall easily within § 1981's protection." 805 F.2d 1143, 1145 (4th Cir. 1986) (emphasis supplied).

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the retroactivity of legislation in general and the retroactive application of the Civil Rights Act of 1991 in particular. "[W]here the congressional intent is clear" on the question of retroactivity, "it governs." *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). The circuits are divided, however, as to whether Congress expressed itself clearly on the issue of retroactive application of the 1991 Act. The lower courts differ as well in their treatment of the "apparent tension" in this Court's jurisprudence on the presumptions to apply when congressional intent is not clear. *See Bonjorno*, 494 U.S. at 837 (referring to the apparently different approaches embodied in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)). For these reasons, the circuits and circuit judges are splintered in the results and rationales of their opinions on the application of the Civil Rights Act of 1991 to cases pending upon its enactment. There are myriad cases pending in the lower courts in which the issue of the retroactive application of the 1991 Act governs the availability and scope of relief. Review by this Court is necessary to resolve this recurring issue of demonstrated complexity and divisiveness.

1. This Court's jurisprudence on the retroactive application of legislation has produced misunderstanding in all three branches of government.

a. To date, seven circuits have considered the issue of the application of the Civil Rights Act of 1991 to pending cases. The court below sought to distingiush between the "substantive" and "remedial" amendments made by the Act: those provisions of the Act that would affect the legality of a party's conduct would not be applied

retroactively, while amendments affecting remedy or procedure could be. 975 F.2d at 898-99 (App. 26a-27a). In this respect, the court below followed the Fifth Circuit's analysis in *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (U.S. Sep. 29, 1992) (No. 92-737). The Fifth Circuit has also ruled, however, that at least some of the remedial provisions of the 1991 Act should not be applied retroactively because this would result in "manifest injustice." *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3371 (U.S. Oct. 28, 1992) (No. 92-757), *quoting Bradley*, 416 U.S. at 711; *see also Baynes v. A.T.&T. Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992).

The Sixth, Seventh and Eighth circuits appear to have taken an unequivocal position, ruling that no provisions of the Act apply to pending cases. *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992); *Kuhn v. Island Creek Coal Co.*, 974 F.2d 1338 (6th Cir. 1992) (table), *petition for cert. filed*, 61 U.S.L.W. 3383 (U.S. Nov. 3, 1992) (No. 92-787) (following *Vogel*); *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3446 (U.S. Dec. 3, 1992) (No. 92-977); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Hicks v. Brown Group, Inc.*, —— F.2d ——, 1992 WL 384862 (8th Cir. Dec. 30, 1992) (*en banc*).

In sharp contrast, the Ninth Circuit in *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-56 (9th Cir. 1992), held that the plain language of the 1991 Act requires that, except as otherwise specifically provided, the amendments apply to all cases pending upon enactment. The court ruled that Congress' specific interdiction of retroactive application of two sections of the

Act[2] evinced an understanding that, absent such express prohibitions, the Act would apply to pending cases.[3]

As these cases demonstrate, the courts of appeals are in disagreement in their assessments of the retroactive application of the Civil Rights Act of 1991. Some circuits have found the Act wholly prospective; others suggest that it is partially retroactive; and one circuit has found the Act, except as explicitly provided, fully retroactive. Review by this Court is necessary to resolve the question of the applicability of the Civil Rights Act of 1991 to cases pending upon its enactment that has so fractured the lower courts.

b. It may be that the tension between *Bradley* and *Bowen* is "more apparent than real." *Bonjorno*, 494 U.S. at 864 (White, J., dissenting). *But see id.* at 840 (Scalia, J., concurring) (the cases "are in irreconcilable contradiction"). Indeed, petitioners argued below that these lines of authority are complimentary, not contradictory, and that properly applied lead to retroactive application of Section 101 of the Act. In any event, while it may "always [be] appropriate to assume that our elected representatives, like our citizens, know the law," *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979), members of Congress share the same confusion as the lower courts concerning the prevailing presumptions about retroactivity of legislation. Because Congress legislates against the backdrop of this Court's jurisprudence, re-

---

[2] *I.e.*, Section 109's extraterritoriality provision does not apply to "conduct occurring before the date of enactment of this Act"; Section 402(b) provides that "notwithstanding any other provision of this Act." the amendments will not apply to certain disparate impact cases.

[3] The issue of the applicability of the Act to pending cases has been briefed and argued but not yet decided in at least three other circuits; *Butts v. City of New York* (2d Cir. No. 92-7850); *Sinnovich v. Port Authority of Allegheny County* (3d Cir. No. 92-3125); and *Patterson v. McLean Credit Union* (4th Cir. No. 92-1376).

view by this Court is necessary here so that Congress will know what it takes to assure that its intent is properly discerned by the courts.

The reported legislative history of the Civil Rights Act of 1991 is largely uninstructive. *See, e.g.*, 137 Cong. Rec. S 15325 (Oct. 29, 1991) (Statement of Sen. Danforth) ("whatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it," and "a court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us"). One thing emerges from this history with certainty, however: Congress too is unsure of the contours of this Court's teaching on retroactivity.

Senator Danforth himself expressed the view that the amendments made by the Act would not apply retroactively. Citing *Bowen*, he said that legislation is presumed to apply only prospectively. 137 Cong. Rec. S 15483 (Oct. 30, 1991). In response, Senator Kennedy relied on *Bradley* to support the position that the amendments should apply to pending cases. 137 Cong. Rec. S 15485 (Oct. 30, 1991).

While it might be tempting to treat the views of Senator Kennedy, the principal Democratic sponsor of the 1991 Act, as the understanding of the majority of the Senate (Senator Danforth's admonition that each Senator speaks only for himself, of course, speaks only for Senator Danforth), the fact remains that the congressional debate revealed a schism: some members believe that, absent manifest injustice, their acts are retroactive, while others believe the opposite. Congress routinely employs the "take effect upon enactment" language used in Section 402(a) of the Act. Yet now it appears, notwithstanding the apparent simplicity of this formulation, that different legislators may have diametrically opposite views as to the meaning of this language. Review by this Court is thus necessary

to settle the debate over the "apparent tension" between *Bradley* and *Bowen* so that Congress itself will have a clear understanding of what "take effect upon enactment" means.

c. It is also evident that the *Bradley/Bowen* framework has confused the Executive Branch or has at least encouraged it to take contradictory positions in different cases. The government has taken a hard line opposing retroactive application of the Civil Rights Act of 1991. Indeed, the Department of Justice argued as *amicus curiae* below that *Bowen* had supplanted *Bradley*—a position that the D.C. Circuit rejected. Just five weeks before enactment of the 1991 Act, however, the Department filed a brief in the Fifth Circuit that cited with approval that court's holding that "[r]etroactive application of a statute is appropriate when Congress enacts the statute to clarify the Supreme Court's interpretation of previous legislation thereby returning the law to its previous posture." *Ayers v. Allain*, 893 F.2d 732, 754-55 (5th Cir. 1990), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990) (*en banc*), *vacated and remanded on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992).[4]

In similar fashion, the government has relied on *Bradley* to persuade several courts that key provisions of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989), as well as the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3154 (1986), should be applied retroactively to cases pending on the date of enactment.[5] Indeed, even after the Department of Justice filed its *amicus* brief below, the govern-

---

[4] *See* Reply Brief for United States filed October 15, 1991 in *United States v. Harris Methodist Fort Worth*, No. 91-1552 (5th Cir.), at 27 n.20.

[5] FIRREA: *FDIC v. Wright*, 942 F.2d 1089 (7th Cir.), *cert. denied*, 112 S. Ct. 1937 (1992); *Reding v. FDIC*, 942 F.2d 1254

ment argued in a criminal case in the Superior Court of the District of Columbia that certain bail reform amendments should be applied retroactively, citing *Bradley* as controlling.[6]

It is possible, of course, that the Executive's varying positions on retroactivity are less the product of confusion than of a conscious effort to manipulate the "apparent tension" between *Bradley* and *Bowen* to suit whatever litigation position the government seeks to advance at a given time. Any body of case law susceptible to such gamesmanship, however, should be revisited and clarified.

2. It is evident that this Court's jurisprudence on the retroactivity of legislation has produced misunderstanding in all three branches of government—the lower courts, the Congress and the Executive. The problem, though, is not simply the difficulty in reconciling the apparently conflicting presumptions in *Bradley* and *Bowen*. It is wrong as well to suggest that the *Bradley/Bowen* lens, however it is ground, is the only one through which issues of retroactivity may be viewed.

As has been recognized, different types of legislation may evoke differing presumptions as to retroactivity. *Bonjorno*, 494 U.S. at 886 (White, J., dissenting); *id.* at 841 n. 1 (Scalia, J., concurring). The type of legislative provision at issue here—Section 101 of the Civil Rights Act of 1991—falls into a narrow and exceptional class: legislation designed to nullify a decision of this Court. There is no dispute that Congress in enacting Section 101 of the Civil Rights Act of 1991 intended to disavow *Patterson* and to restore 42 U.S.C. § 1981 to its pre-*Patterson*

(8th Cir. 1991). False Claims: *United States v. Rockwell International Corp.*, 730 F. Supp. 1031 (D.Colo. 1990); *United States ex rel. McCoy v. California Medical Review, Inc.*, 723 F. Supp. 1363 (N.D. Cal. 1989).

[6] *See* Memorandum for the United States filed April 22, 1992 in *United States v. Bostick*, Cr. No. F 14117-88 (D.C. Super.Ct.).

state.[7] Nor is there any question that Congress generally has authority to write legislation that applies retroactively to pending cases. In these circumstances, it would impute a bizarre motive to Congress to *presume* that in taking the extraordinary step of overturning a decision of this Court and returning the law to its intended state, Congress nevertheless meant to allow the erroneous construction to stand for any period.

For this reason, the lower courts have generally applied laws designed to overturn a decision of this Court to cases pending upon enactment. For example, Congress enacted the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988), to negate *Grove City College v. Bell*, 465 U.S. 555 (1984). The Fifth Circuit (at the government's urging) held that that Act applied to a case pending upon enactment. *Ayers v. Allain*, 893 F.2d at 754-56. The Eleventh Circuit reached the same conclusion in *Lussier v. Dugger*, 904 F.2d 661, 666 (11th Cir. 1990), observing that the Civil Rights Restoration Act "does not change prior legislation, but rather merely corrects judicial interpretation which the Congress believed 'unduly narrowed or cast doubt upon the broad application' of the civil rights laws." In similar fashion, the Second Circuit in *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987), applied the provisions of the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986), that overruled *Smith v. Robinson*, 468 U.S. 922 (1984), to a suit filed before enactment. *See also Fortenot v. Louisiana Bd. of Elem. & Sec. Educ.*, 805 F.2d 1222 (5th Cir. 1986) (same). And in *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1552-55 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984), the court applied those provisions of the

---

[7] Congressional disagreement with *Patterson* was bipartisan. Section 6 of the Administration-approved substitute civil rights bill offered by House Minority Leader Michel contained language virtually identical to that finally adopted in Section 101 of the 1991 Act. *See* 137 Cong. Rec. H 3897 (June 4, 1991).

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982), that overruled *City of Mobile v. Bolden*, 446 U.S. 55 (1980), to a pending case.

It may be, then, that the retroactivity issue posed by Section 101 of the Civil Rights Act of 1991 should be resolved without reference to *Bradley* and *Bowen* at all. Judicial decisions ordinarily operate retroactively, and it may reasonably be presumed that Congress—in acting to overturn judicial construction of a statute—is exercising its full constitutional authority to extirpate the offending decision by applying its remedial legislation retroactively as well.

Such a presumption is especially sensible in a case like the present one, where retroactive application of a statute simply restores the law to what it had been when the claim arose. In October 1987, when GHA severed its contract with CSI because Alan Gersman is Jewish, no one doubted that 42 U.S.C. § 1981 covered contract terminations. It is only because of the retroactive application of *Patterson* itself that GHA hoped to avoid justice. There is certainly no injustice, let alone "manifest injustice," *see Bradley*, 416 U.S. at 711, in presuming that Congress intended that Section 101 would likewise operate retroactively to restore the original playing field.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

DAVID H. SHAPIRO
DOUGLAS B. HURON *
MICHAEL J. KATOR
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005
(202) 898-4800
Attorneys for Petitioners

* Counsel of Record

January 13, 1993

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 12, 1992 Decided September 15, 1992

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.,
Appellee

On Remand from the United States Supreme Court

Douglas B. Huron, with whom *David H. Shapiro* was on the brief, for appellants.

Anita Barondes, with whom *Peter Chatilovicz*, *Ronald A. Lindsay* and *Christopher A. Weals* were on the brief, for appellee.

Stuart M. Gerson, Assistant Attorney General, with whom *Jay B. Stephens*, United States Attorney, *Marleigh D. Dover* and *Jacob M. Lewis*, *Attorneys*, Department of Justice, were on the brief, for Amicus Curiae United States of America, urging that this Court reinstate its prior judgment on the grounds that the Civil Rights Act of 1991 not be retroactively applied in this case.

Robert E. Williams and *Douglas S. McDowell* were on the brief for Amicus Curiae Equal Employment Advisory

Council, urging that this Court hold that the Civil Rights Act of 1991 does not apply to cases pending on the date of enactment.

Jill L. Kahn, for Anti-Defamation League of B'Nai Brith, *Eliot Mincberg* for People for the American Way, *Charles Stephen Ralston* and *Kerry Scanlon* for NAACP Legal Defense and Education Fund, and *Richard T. Seymour* for Lawyers' Committee for Civil Rights Under the Law were on the joint brief for Amici Curiae, urging that section 101 of the Civil Rights Act of 1991 applies to this case.

Before WALD, BUCKLEY and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting Opinion filed by *Circuit Judge* WALD.

SENTELLE, *Circuit Judge*: When last we considered this case, we affirmed the judgment of the District Court dismissing appellants' complaint for failure to state a claim on which relief could be granted. We now reconsider that decision on remand from the Supreme Court in light of the Civil Rights Act of 1991. Because we find pertinent portions of that Act do not apply retroactively, we conclude that our original opinion remains a valid statement of applicable law. Thus, we again affirm the District Court's dismissal.

I. BACKGROUND

A. *Factual Background and Procedural History*

As indicated above, this case is on a return visit to our Court. While the facts are discussed at some length in our prior opinion, *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), and the original District Court decision by the same name, 725 F. Supp. 573 (D.D.C. 1989), we will sketch them here briefly as a foundation for the further discussion of the case's procedural history which follows.

Alan Gersman and Computer Security International, Inc. ("CSI"), of which he is president (collectively "appellants" or "CSI"), brought suit against Group Health Association, Inc. ("GHA" or "appellee") under 42 U.S.C. § 1981, alleging that GHA had wrongfully terminated a contract with CSI in 1987 because its president was Jewish.[1] The District Court held that neither the individual nor the corporate plaintiff had standing. 725 F. Supp. at 577-78. The District Court alternatively held that the Supreme Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), governed the case; that under *Patterson*, § 1981 afforded relief only for discrimination in the formation of contracts; and that therefore, plaintiff's allegations of a discriminatory termination stated no claim. *Id.* at 574-76.

On appeal, we concluded that the District Court was correct on both grounds as to Gersman, but held that CSI had standing. We nonetheless affirmed because we agreed that *Patterson* governed, and that under *Patterson*, CSI had failed to state a claim. *Gersman*, 931 F.2d at 1572-73.

Thereafter, appellants sought *certiorari* to the Supreme Court. On Januay 27, 1992, the Supreme Court granted the writ of *certiorari* but did not approach the merits. Rather, it vacated the judgment and remanded the case to this Court "for further consideration in light of the Civil Rights Act of 1991." 112 S.Ct. 960, 960 (1992).

B. *The Statutory Framework*

At the time of our prior decision, 42 U.S.C. § 1981 was the only United States statute arguably reaching the conduct alleged in this case. That statute guarantees the

---

[1] Appellants also claimed under the District of Columbia Human Rights Act, D.C. Code §§ 1-2501 *et seq.* Because the changes in the law prompting the Supreme Court to remand our earlier decision have no effect on the dismissal of that claim, we will not further discuss it.

right to "make and enforce contracts" under the "equal benefit of all laws . . . ." In *Patterson*, the Supreme Court interpreted the contract clause of the statute as meaning what it says, but no more. That is, § 1981 was held to apply to the formation of contracts, but not "to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." 491 U.S. at 171. In our original *Gersman* decision, we applied *Patterson* to the facts of this case and held that the complaint stated no claim under § 1981.

After the entry of our decision but while CSI's petition for *certiorari* was still pending before the Supreme Court, Congress enacted the Civil Rights Act of 1991. That Act included a provision adding two new subsections to § 1981. Subsection B provides:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

PUB. L. NO. 102-166, § 101, codified at 42 U.S.C. § 1981 (emphasis added). The essential question for us today is whether that subsection applies retroactively to pending cases which seek redress under § 1981 for conduct occurring prior to its enactment.

II. ANALYSIS

Unsurprisingly, CSI argues that the Civil Rights Act of 1991, or at least the pertinent provision, applies retroactively. Equally predictably, GHA argues that it does not. Both assert presumptions drawn from Supreme Court decisions. While we will trace the origin and reasoning of these presumptions at greater length below, we introduce each briefly here. Appellants rely on *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974),

which asserted "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

GHA argues from *Bowen v. Georgetown Hospital*, 488 U.S. 204, 208 (1988), which stated that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."

A. *Congressional Intent*

We are thus apparently trapped between opposed walls of presumption directed by the Higher Authority. Initially, the language of both presumptions appears to open a possible line of interpretive escape; each presumption applies only in the absence of statutory terms clearly directing the choice between retroactive and prospective application.

Each party here argues that Congress has set such guideposts. Each party points to some of them. Unfortunately, the guideposts point in conflicting directions. Appellants offer three parts of the Civil Rights Act of 1991 bearing on the question at hand: (1) § 101 itself; (2) the general effective date of the Act set forth in § 402(a); and (3) §§ 109(c) and 402(b), which address questions of retroactivity. As appellants see it, the language of § 101 saying that "the term 'make and enforce contracts' includes the . . . termination of contracts," coupled with the enacting language of § 402(a), "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," establishes the statute's retroactivity. They argue that because the statute's enactment date is November 21, 1991 and the Act contains no other language of prospectivity, courts addressing cases after the effective date should apply § 101, whether the conduct under adjudication occurred before or after the enactment. It

is not apparent to us that this is anything more than a restatement of the *Bradley* presumption.

Appellee argues the contrary from the same language. That is, appellee asserts the "take effect upon enactment" language in § 402(a) is evidence of congressional intent that the amendment apply prospectively only. In appellee's view, the District Court rehearing the controversy between Patterson and the McClean Credit Union interprets this provision correctly by holding that "the four words 'take effect upon enactment' must be interpreted to indicate a beginning point . . . from which date the Act and its amendments would be operative on events coming within their scope, but having no effect on events occurring before that date as the Act was not operative prior to November 21, 1991." *Patterson v. McLean Credit Union*, 784 F. Supp. 268, 273-74 (M.D.N.C. 1992). *Accord Franklin v. New Mexico*, 730 F.2d 86, 87 (10th Cir. 1984) (statutory language that " 'amendments made by this section shall become effective on the date of the [statute's] enactment' . . . indicate[s] an intent for prospective application of the amendment.").

Appellee goes on to argue that we should read the "take effect upon enactment" language as evidencing a congressional intent to preclude retroactive application because Congress has expressed itself quite clearly in other statutes where it intended retroactive application. They offer us by way of example the Federal Home Loan Bank Act, 12 U.S.C. § 1439(a) (all monies deposited pursuant to the statute shall be available "retroactively as well as prospectively"); Black Lung Benefits Act, 30 U.S.C. § 945(a)(1) & (c) (providing for processing of benefit claims "pending on, or denied on or before" the effective date and awarding benefits "on a retroactive basis").

Again, it would seem that this argument is no more than a restatement of the *Bowen* presumption. Thus, after we examine the language of the relevant section

and the enacting section, we are left with each side arguing that Congress has expressed an intent to apply the statute in a manner consistent with that side's view because it has not given us language clearly expressing a contrary intent. Appellants thus come back around to the *Bradley* presumption from which they started and, likewise, appellee returns to the *Bowen* presumption.

Once before in considering the apparent inconsistency in presumptions established by the *Bradley* and *Bowen* decisions, we noted that an act stating "only when . . . amendments 'become effective' " but not stating "whether they apply to conduct preceding the specified date or to litigation pending on that date," is ambiguous and "does not *require* us to apply" the amendments to conduct preceding the enactment or to litigation pending at the day of enactment. *Alpo Pet-foods, Inc. v. Ralston Purina, Co.*, 913 F.2d 958, 964 n.6 (D.C. Cir. 1990) (Thomas, J.). Consistent with our prior decision, we can find no unambiguous answer to the retroactivity question in the enacting language here.

Appellants' argument from §§ 109(c) and 402(b) carries a bit more substance, but only a bit. Section 109 extends the coverage of Title VII and the Americans with Disabilities Act to extraterritorial employment. Subsection (c) provides that "the amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this act." Subsection 402(b) is contained in the same section as the general effective date. The subsection specifies that "notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." The striking specificity of this last subsection was directed toward *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642 (1989), the case in which the Supreme Court clarified the burden of proof rules in dis-

parate impact cases under Title VII. All parties agree that Congress enacted § 105 of the Act with the express intent to effect a shifting of the burden of proof in disparate impact cases.

Appellants argue that the inclusion of express language against retroactivity in §§ 109(c) and 402(b) should convince us that Congress intended retroactive application of the rest of the Act under the Supreme Court's caution that "no provision [of a statute] should be construed to be entirely redundant," *Kungys v. United States*, 485 U.S. 759, 778 (1988). As appellants further note, the Supreme Court has elsewhere advised: "[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988).

However, given the convoluted legislative history of this Act and the war of interests firing at each other across the floor of both legislative houses, one might view these two subsections not as redundancies, but rather as insurance policies. Senator Dole, a principal proponent of the inclusion of § 402(b), which had been inadvertently omitted from the Senate version of the Act, expressly argued that "[a]bsolutely no inference is intended or should be drawn from the language of this [section] that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act." 137 CONG. REC. S15,953 (daily ed. Nov. 5, 1991). Likewise, Senator Danforth, recognized by appellants themselves as "the Senator most responsible for passage of the Civil Rights Act of 1991," Brief for Appellants at 16, stated that the section "should not be read in derogation of the sponsors' intention not to provide for retroactive effect . . . ." 137 CONG. REC. at S15,483 (daily ed. Oct. 30, 1991). On the House side, Representative Hyde assured his colleagues that the section was "unnecessary" and "surplusage" and that it did "not

accomplish or achieve a thing and it should not be the subject of so much excitation." 137 CONG. REC. H9,512 (daily ed. Nov. 7, 1991). *See also* 137 CONG. REC. S15,966 (daily ed. Nov. 5, 1991) (remarks of Senator Gorton) ("the language in question does no more than reaffirm for one specific case the more general mandate of the bill that the civil rights amendments will be applied prospectively").

We hasten to say that we do not rely on these snippets of legislative history as definitive evidence of congressional intent. Appellants offer language from other sections with no direct bearing on the question of retroactivity of § 101(b), and argue that a failure to apply § 101(b) retroactively attributes to Congress an intent to insert redundancy into the Act. We offer the legislative history only to illustrate that such an intent is by no means an impossibility. Although it is helpful in construing one section of a statute to test whether a proffered interpretation would render another section surplusage, it is not conclusive. Given the potentially drastic impact of retroactivity of the disparate impact section of the *Wards Cove* defendants, it is not unthinkable that legislators wished to reassure the employers that they would not face recoveries of back pay plus interest from some time in the early 1970s for conduct committed twenty years or so before the passage of the statute.

Although the legislative history we offer above does no more than illustrate the possibility that Congress may have intended such an insurance policy, it also does no less. At the end of our examination, we remain where we began. Congress has not provided a clear expression of its intent as to the retroactive or prospective application of § 101(b) in the language of the statute.

B. *Legislative History*

Even as each litigant offers us sections of legislative language to support opposing views of congressional intent on the retroactivity question, so do they and their

supporting *amici* offer segments of legislative history. We examine their offerings, but we caution at the outset that we do so with much reluctance. At its best, legislative history is an undependable guide to the meaning of a statute. In the first place, we must remember that it is the meaning of the statute, and not the disembodied intent of the legislature, that we seek. "As Justice Holmes remarked, 'we do not inquire what the legislature meant; we ask only what the statute means.' " Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 378 (quoting O.W. Holmes, *The Theory of Legal Interpretation* in Collected Legal Papers, 207 (1920)).

We offer this observation not merely for its cleverness, but also for its substance. It is only the statute itself that is law. A statement by a single member of the legislature or a report by single committee (or even by an entire house) is not. The Supreme Court has noted that a bill is not law until it is passed by both the Houses and presented to the President for his approval, or re-passed by two-thirds of *each* House after his disapproval. *INS v. Chadha*, 462 U.S. 919, 945-46 (1983) (citing U.S. CONST. art. 1, sec. 1 & sec. 7 cl. 2, 3).

With full awareness of the warning signs, we walk through the mine field of legislative history in search of congressional intent only with grave trepidation. Once there, we find that the cautions were never more warranted. Many versions of the Civil Rights Act were offered, many were rejected. One was passed, only to be vetoed. Finally, after much amendment, compromise, and rhetoric, Congress enacted the bill that the President signed. Along the way, many representatives and many senators speaking for various constituencies made a variety of remarks. Never have we been so convinced of the wisdom of the late Judge Leventhal's observation that "reviewing legislative history is like looking over the crowd at a party and picking out one's friends." *See* Wald, *Some Observations on the Use of Legislative History in the*

1981 Supreme Court Term, 68 IOWA L. REV. 195, 214 (1983). In the present case, each side introduces us to its own favorite acquaintances.

Appellants first point us to the historic fact that Representative Michel offered a substitute bill for the Civil Rights Act of 1991. That substitute contained a two-sentence provision on the effective date:

> This act and the amendments made by this act should take effect upon enactment. The amendments made by this act shall not apply to any claim arising before the effective date of this act.

137 CONG. REC. H3,898 (daily ed. June 4, 1991). As the version ultimately adopted by Congress contained a one-sentence enactment clause identical to the first sentence in the Michel substitute, but did not contain the second sentence, appellants argue that we should infer that Congress expressly rejected the idea embodied in the second sentence that the Act does not apply to deeds done before its effective date. From this they would then have us reason that Congress must have expressly intended the opposite; that Congress did intend to regulate deeds done before the passage of the Act. *See generally Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). Unfortunately, this argument is little more than a rehash of the *Bradley* presumption: in the absence of an contrary comment, the Act applies retroactively.

For the most part, however, appellants, with commendable candor, note that the bill, having followed a tortuous path to enactment, did not leave behind the more useful footprints of legislative history, such as committee reports or single houses or a conference report. The House of Representatives acted first and passed a comprehensive bill. The Senate deliberated without the benefit of the normal

committee process, attempting to fashion a proposal that would command the support of a veto-proof bipartisan majority of Senators. The House simply took up and passed the Senate bill without conference.

Both Senator Danforth, a principal Republican sponsor of the final bill, and Senator Kennedy, a principal Democratic sponsor, indicated that the legislative history had little utility. Danforth: "Whatever is said on the floor of the Senate about a bill is the view of the Senator who is saying it. And if it is not written into legislative language, it does not necessarily bind and probably does not bind anybody else, including the 30-some odd cosponsors of the legislation." 137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991). Kennedy: "It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the day of enactment." 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991).

Appellee nonetheless presents several of its "friends." Not the least of these is the President's veto message of the 1990 Act, which specifically singles out "unfair retroactivity rules" as a reason for the veto. President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1632, 1634 (Oct. 22, 1990). Appellee reasons that the subsequent signing by the President of the 1991 Act indicates understanding by him—one of the three parties to its enactment—that no such retroactivity was intended.[2]

Appellee further offers us reasoning not unlike the argument appellants advanced with reference to Representative Michel's substitute. H.R. 1, rejected by the substitution of the Senate version, contained explicitly retroactive transition rules. As the final version did not, appellants argue that we should conclude that Congress

---

[2] The three parties to which we refer are the two Houses necessary for bicameral enactment and the President necessary for presentment.

had no intention to make the Act retroactive. We should therefore hold, they argue, that Congress intended it to be prospective only. *See Fray v. Omaha World Herald Co.* 960 F.2d 1370 (8th Cir. 1992) (concluding that legislative history clearly indicates that the Civil Rights Act of 1991 should be applied prospectively). This last step sounds a great deal like the presumption advanced in *Bowen.* It does not sound like very much more.

Appellee goes on to offer us numerous statements placed in the record by numerous members of the Congress after the statute's enactment. As we have noted before, a "contradiction between [congressmen on opposite sides of a question of legislative interpretation] need not dismay us, nor need we seek to resolve it." *Antolok v. United States*, 873 F.2d 369, 377 (D.C. Cir. 1989). Such a contradiction "may simply remind us once again that

> an endemic interplay, in Congress, of political and legislative consideration . . . makes it necessary for judges to exercise extreme caution before concluding that a statement made in floor debate, or at a hearing, or printed in a committee document may be taken as statutory gospel.

Id. (quoting *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring)). More bluntly put, a single member may be attempting to reassure his own constituency or even to create legislative history for citation by courts. *See generally International Bhd. of Elec. Workers*, 814 F.2d at 715-20 (Buckley, J., concurring).

To our minds the most convincing floor statement is one presented by appellants:

> I simply want to state that a court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record

> which purport to create an interpretation for the legislation that is before us.

137 CONG. REC. S15,325 (daily ed. Oct. 29, 1991) (statement of Senator Danforth).

As the reader may have by now surmised, we do not find the legislative history to resolve the question of legislative intent. We are therefore left where we began this analysis. That is, appellants principally rely on the *Bradley* presumption. Appellee principally relies on the *Bowen* presumption. They are in apparent conflict.

C. *The Conflicting Presumptions*

Before attempting to determine which of the apparently conflicting presumptions govern the case before us, we will review at some greater length the two lines of authority. In *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), several black plaintiffs had brought an action to compel desegregation of the public schools of Richmond, Virginia. During the progress of the litigation, the school board conceded that the plan under which it had been operating was not constitutional. After further proceedings concerning the remedy, the district court entered a judgment in favor of the plaintiffs, which included a fee award. The school board appealed from the award of fees.

Following initial submissions of the case to the Court of Appeals but before its decision, Congress enacted § 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 which granted federal courts authority to award attorneys fees to a prevailing party in a school desegregation case. The Fourth Circuit, noting that no orders were pending or appealable before the district court on the effective date of the statute, ruled that § 718 did not apply to services rendered prior to its effective date. The Supreme Court reversed.

In analyzing the retroactivity question, the *Bradley* Court looked first to the words of Chief Justice Marshall in *United States v. Schooner Peggy*, 1 Cranch 103 (1801). In that case Marshall had noted for the Court that the "general rule" is that "an appellate court is only to inquire whether a judgment, *when rendered*, was erroneous or not." *Id.* at 110 (emphasis supplied). But the Court further noted, "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs," the new law must be obeyed. *Id.*

The Court went on to qualify that obligation, however, by recognizing that "[i]t is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ." *Id.* at 110. But the *Schooner Peggy* case was not a "mere private case between individuals." It involved condemnation following seizure of a French vessel by an American ship. During the pendency of the case on appeal to the Supreme Court from the Circuit, the two nations entered a convention "providing in part: 'property captured and not yet *definitively* condemned, or which may be captured before the exchange of ratification . . . shall be mutually restored.' " *Bradley*, 416 U.S. at 712 n.16 (quoting *Schooner Peggy*, 1 Cranch at 107 (emphasis in *Bradley*)). This being the case, the *Schooner Peggy* court went on to state that "in great national concerns, . . . the Court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." 416 U.S. at 712 (quoting *Schooner Peggy*, 1 Cranch at 110).

Obviously, there is some distance between the *Schooner Peggy* ruling, establishing that the law at the time of the appellate hearing applies in cases of great national

concern but is to be "struggled against" in cases between private parties, and a flat presumption that laws apply retroactively. In bridging that gap, the *Bradley* Court relied on only one case between the 1801 decision and its own 1974 holding. In that one case, *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), the Court ruled in more general terms that "an appellate court must apply the law in effect at the time it renders the decision." *Id.* at 281.

In the *Thorpe* decision, after the plaintiff Municipal Housing Authority had obtained an eviction order from a state court, and after that order had been affirmed by the state supreme court, *Housing Authority of Durham v. Thorpe*, 267 N.C. 431, 148 S.E.2d 290, *cert. granted*, 385 U.S. 967 (1966), the Department of Housing and Urban Development published a circular ordering new procedural prerequisites for such a eviction. The United States Supreme Court then remanded to the Supreme Court of North Carolina "for such further proceedings as [might] be appropriate in the light of" the Housing and Urban Development directive. *Thorpe v. Housing Authority of Durham*, 386 U.S. 670, 673-74 (1967) (per curiam). The North Carolina Supreme Court reaffirmed its original decision at 271 N.C. 468 (1967), *sub. nom. Housing Authority of Durham v. Thorpe.*

The United States Supreme Court again granted *certiorari* and this time reached the retroactivity issue. Relying on *Schooner Peggy*, the Court held that "the general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." 393 U.S. at 281. In its analysis of Thorpe, the *Bradley* Court reaffirmed that the decision "stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

The *Bradley* Court went on to note, as we did in our brief discussion above, that this presumption would apply only "in the absence of clear legislative direction to the contrary . . . ." 416 U.S. at 715. Moreover, it suggested a remaining vitality to Chief Justice Marshall's concern about retroactivity in "'mere private cases between individuals.'" 416 U.S. at 718 (quoting *Schooner Peggy*, *supra*, at 110). The Court also noted possible exceptions to retroactivity in cases where it could cause a party to suffer "manifest injustice." 416 U.S. at 716 (citing *Thorpe*, 393 U.S. at 282 (in turn citing *Greene v. United States*, 376 U.S. 149, 160 (1964))). In exposing its concern for the disruption of the legal relationship between private parties, the Court suggested that possible injustices resulting from retrospective application would include infringement upon or deprivation of "a right that had matured or become unconditional." 416 U.S. at 720 (citing *Greene v. United States*, 376 U.S. at 160). Finally, the *Bradley* Court implied that such manifest injustice would occur where the retrospective application would impose "new and unanticipated obligations . . . without notice or an opportunity to be heard." 416 U.S. at 720.

Appellants argue that none of these exceptions applies and therefore that the *Bradley* presumption should govern. Unfortunately for appellants (and perhaps for our ease of decision, although the question of the application of the exceptions may not be as simple as appellants assume), that is not the end of the Supreme Court's treatment of the retroactivity question. In *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988), the Supreme Court held, "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* at 208. In *Bowen*, the Secretary of Health and Human Services had promulgated new regulations setting limits on the level

of reimbursement allowable for Medicare costs. The Secretary attempted to apply these limitations retroactively. In the language quoted above, the Supreme Court affirmed the Court of Appeals and District Court decisions denying the Secretary's retroactive application. Justice Kennedy, writing for a unanimous Supreme Court,[3] did so without citing either *Bradley* or *Thorpe*.

The *Bowen* Court did, however, cite a long line of cases supporting its presumption against retroactivity—a line not overruled in either *Bradley* or *Thorpe*. *See, e.g.*, *Greene v. United States*, 376 U.S. 149, 160 (1964)[4]; *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); and *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928).

To take the oldest from the *Bowen* Court's list, in the *Magnolia Petroleum* case, the Supreme Court considered an amendment to the Revenue Act affecting the computation of interest on refunds. The Commissioner of Internal Revenue had calculated interest due based on the statute in effect at the time of the payment. The taxpayer contended that interest should be computed according to the later enactment. In rejecting the taxpayer's contention, the unanimous Supreme Court held, "[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." 276 U.S. at 162-63. In support of this proposi-

---

[3] Justice Scalia wrote a separate concurrence but expressly "agree[d] with the Court that general principles of administrative law suggest that . . . the Medicare Act . . . does not permit retroactive application of the . . . cost-limit rule." 488 U.S. at 216 (Scalia, J., concurring).

[4] The *Bradley* Court did cite *Greene* as an example of a case where "manifest injustice" caused an exception to its perceived presumption of retroactive application. 416 U.S. at 716-17.

tion, the *Magnolia Petroleum Court* cited a line of cases dating back to *United States v. Heth*, 3 Cranch 399, 413 (1806) ("[w]ords in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.").

In fact, as one of our sibling circuits has noted, the principle of legislative prospectivity began with Roman civil law and extended forward "through the centuries [of] venerable common law commentators such as Bracton, Cope, Blackstone, and Sir Francis Bacon." *Fray v. Omaha World Herald Company*, 960 F.2d 1370, 1374 (8th Cir. 1992) (citing Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775, 775-81 (1936)). As the *Fray* Court further noted, prior to the *Thorpe* decision "this was a long and well established principle of American jurisprudence as well . . . ." *Id.*

In fact, the Supreme Court has stated more than once that

> [T]he *first* rule of construction is that legislation must be considered as addressed to the future, not to the past . . . a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms and the manifest intention of the legislature,"

Greene v. United States, 376 U.S. at 160 (quoting *Union Pacific Railroad Co. v. Laramie Stockyards Co.*, 231 U.S. 190, 199 (1913)). As the Eighth Circuit noted in *Fray*, "the Supreme Court destabilized this rather settled doctrine in *Thorpe* . . . and again in *Bradley*. . . ." 690 F.2d and *Thorpe* decisions do not overrule the prospective presumption lines and the *Bowen* Court neither overrules

nor cites *Bradley* and *Thorpe*. Thus, the two presumptions continue to exist in apparent inconsistency.

The problem posed by the conflicting lines surfaced in *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990). There, the Court considered an amendment to 28 U.S.C. § 1961 changing the rate at which post-judgment interest should be calculated passed after the entry of a judgment. Justice O'Connor, for the majority, recognized the two presumptions and the "apparent tension" between "the rule articulated in *Bradley*" and the "generally accepted axiom" reaffirmed in *Bowen*. 494 U.S. at 837. The Court nonetheless did not find it necessary to "reconcile the two lines of precedent" because the Court found clear congressional intention that the amendment to § 1961 was to apply prospectively only. *Id.*

However, four justices of the Court did not find congressional intent to be nearly so clear as did the majority. Justice White, writing for himself and Justice Marshall, Brennan, and Blackmun, determined that "the tension" between *Bradley* and *Bowen* "is more apparent than real . . . ." 494 U.S. at 864 (White, J., dissenting). In his view—which admittedly we oversimplify—the *Bowen* presumption applies to prevent " 'altering the *past* legal consequences of past actions.' " *Id.* at 866 (emphasis in original) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)). The *Bradley* presumption, on the other hand, is in Justice White's view a choice-of-law rule making it the general practice that changes in law apply to pending cases. Justice White would not apply this choice-of-law rule mechanically, but would examine the status of rights involved and the public interest implicated.

Justice Scalia, who joined Justice O'Connor's majority opinion in *Kaiser Aluminum*, nonetheless wrote separately to treat at length the *Bradley-Bowen* problem. To

him the "two lines of cases are not merely . . . in 'apparent tension' . . . they are in irreconcilable contradiction. . . ." 494 U.S. at 841 (Scalia, J., concurring). Justice Scalia's concurrence catalogs at length the history of the presumption against retrospective operation, concluding that "[d]uring . . . more than 150 years of doctrinal certainty," the Supreme Court denied retroactive application to new statutory law except when "the statute affirmatively so required." *Id.* at 844. He then reviewed the *Thorpe-Bradley* line and argued that those cases misinterpreted and misapplied *Schooner Peggy*. In Justice Scalia's view, *Schooner Peggy* stands for the proposition that only when Congress "*plainly says*" that legislation has retroactive effect are courts to depart from "the ordinary presumption which courts will 'struggle hard' to apply" against retroactivity. *Id.* at 846-47 (emphasis in original) (quoting *Thorpe*, 393 U.S. at 281). Without reiterating the entire argument, we note that Justice Scalia set forth a record of

> (1) An unbroken line of precedent, prior to 1969, applying a presumption that statutes are not retroactive (except for repeal of penal provisions in *all* cases). (2) In 1969, with *Thorpe*, a departure from the tradition . . . for cases in which the statute has been enacted after initial adjudication. (3) From 1969 to the present, (a) firm adherence to the prior tradition in cases not involving post-adjudication enactment, and (b) the expression of adherence to the new presumption in post-adjudication enactment cases, but with only one case (*Bradley*, in 1974) where it seemingly produced a difference in outcome . . . .

Id. at 853-54.

It is against this background that we must determine the retroactivity question in the present case.

D. *Reconciliation and Application*

We might echo Justice Scalia's plea in his *Kaiser Aluminum* concurrence that the Supreme Court "eliminate the confusion of the past two decades" and unqualifiedly affirm the principle of construction to be applied in retroactivity cases. 494 U.S. at 858 (Scalia, J., concurring); *see also Luddington v. Indiana Bell*, 966 F.2d 225 (7th Cir. 1992) (suggesting that the absence of a clear judicial retroactivity rule may provide an incentive for Congress to avoid addressing whether a new statute will have prospective or retroactive effect). We, however, obviously lack the power to overule either *Bowen* or *Bradley* and therefore must find some principled way to determine which governs the case before us.

In our search we find persuasive and illuminating the exposition of Justice Scalia in his separate opinion in *Kaiser Aluminum*. As we discussed above, that separate opinion detailed how the historic line of Supreme Court decisions logically lead to a conclusion that new statutory law is presumed to apply prospectively except when "the statute affirmatively so require[s]." *Kaiser Aluminum*, 494 U.S. at 844. Persuasive as we find this, however, it remains the exposition of a single Justice and cannot overrule *Bradley* and *Thorpe*.

A further element of authority informing our decision-making is prior case law within our Circuit. While we have not spoken to the question of retroactivity of the Civil Rights Act of 1991, we have previously addressed the general retroactivity principle which must govern it. Indeed, one district court within this Circuit has applied our prior teachings to the question of retroactivity of another provision of the 1991 Act. In *Van Meter v. Barr*, 778 F. Supp. 83, 84-85 (D.D.C. 1991), the district court held that the statute applied only prospectively, and further held that this conclusion was compelled by our deci-

sions *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), and *Wagner Seed, Inc. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991).

Indeed, the district court's decision in *Van Meter* was obedient to our language in those cases. In *Alpo*, as the *Van Meter* court noted, we stated:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

913 F.2d at 964 n.6 (Thomas, J.) (quoting *Bowen v. Georgetown Hospital*, 480 U.S. at 208). Likewise, in *Wagner Seed*, we stated that "[i]f the presumption against retroactivity is not rebutted by clear terms to the contrary . . . then the statute applies only prospectively." 946 F.2d at 924. We cited an array of Supreme Court cases in support of this proposition. The *Van Meter* district court therefore was on firm ground when it held the presumption against retroactivity to be the law of this Circuit.

At first blush, it would appear that we, like the district court in *Van Meter*, should simply bind ourselves to our prior opinions and declare for *Bowen* over *Bradley*. We are, after all, bound by the decisions of prior panels of this Court "unless and until overturned by the court *en banc* or by Higher Authority." *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 54 (D.C. Cir. 1987) (Ruth B. Ginsburg, J., concurring). However, for two reasons, we do not deem ourselves to be so completely bound in the present case. First, the quoted language from *Alpo Petfoods* is candidly *dicta*. As we stated later in the same footnote, "even if we were to apply the *Bradley* presumption and give the 1988 Act retroactive effect, the substance of our . . . analysis would remain the same." 913 F.2d at 964 n.6. In *Wagner Seed*, the *Bowen*

analysis is not determinative of the result either, and therefore must be deemed not a holding, but rather a *dictum*, albeit an exceedingly strong one.[5] Binding circuit law comes only from the holdings of a prior panel, not from its dicta. *Cf. United States v. North*, 910 F.2d 843, 881 (D.C. Cir. 1990) ("[w]e are bound only by prior *published opinions* of this Circuit and not by other means of deciding cases.").

Second, even if the language of *Alpo Petfoods* and *Wagner Seed* were holdings rather than dicta, we still would be left with the troubling fact that two unreversed decisions of the Higher Authority are contra. Therefore, although we conclude that the language of our prior decisions impels us toward a presumption of prospectivity, we cannot comfortably assert that we are fettered by them to that choice.

Thus, the greater weight of authority from the Supreme Court and the existing authority from this Circuit establish that as between the two propositions that statutes presumptively apply to pre-enactment conduct and that they presumptively apply only to post-enactment conduct, the latter prevails. That is, generally "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen*, 488 U.S. at 208. In addition to conforming to the longest and largest line of Supreme Court decisions, this has the obvious salutary result that persons may know when they act the legal consequences of their actions. " '[R]etrospective laws are

---

[5] We do not mean by this to imply that the district court in any fashion erred in following our prior language. Had the Court above us given as clear guidance in the choice between *Bowen* and *Bradley* as we gave the district court, we would without doubt be following it today, even if it were in dicta. On the other hand, we do not mean to imply affirmation of the *Van Meter* decision either. That case now pends before another panel of this Court. We do not have the full record before us, and they, not we, will of course determine the result in that controversy.

. . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact.'" *Kaiser Aluminum v. Bonjourno*, 494 U.S. at 855-56 (Scalia, J., concurring) (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION, § 1398 (1851)).

Nonetheless, that leaves us, as an inferior court, with the question of what to do with the presumption stated by *Thorpe* and *Bradley* in the highest court. We are not in fact the first circuit to wrestle with this problem. The Fifth, Sixth, Seventh, and Eighth Circuits have already dealt with the question of the retroactivity or prospectivity of the Civil Rights Act of 1991. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1374-78 (8th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 934-38 (7th Cir. 1992); and *Vogel v. Cincinnati*, 959 F.2d 594, 597-98 (6th Cir. 1992). All have held, as we do, that the Act does not apply retroactively.

In our holding, we are informed, as have been three of our sibling circuits, by the Supreme Court's decision in *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985). *See Fray*, 960 F.2d at 1374; *Uncle Ben's*, 965 F.2d at 1374; and *Mozee*, 963 F.2d at 934.

In *Bennett*, the Supreme Court considered a controversy arising from efforts of the United States Secretary of Education to recover from the state of New Jersey federal grant funds allegedly misused during the years 1970-72. The statute governing the grants, 20 U.S.C. § 241(a) *et seq.* had been amended in 1978. The Third Circuit had held that standards set by the amendments should apply to determine the propriety of expenditures in previous years. *New Jersey Department of Education v. Hufstedler*, 724 F.2d 34, 36-37 (1983). The Supreme Court reversed, and in doing so, discussed *Bradley*. The Court noted that *Bradley* had held "a

statutory provision for attorney's fees applied retroactively to a fee request that was pending when the statute was enacted." 470 U.S. at 639. The Court further noted the *Bradley* Court's recognition of "the general principle that a court must apply the law in effect at the time of its decision . . . ." *Id.* However, the *Bennett* Court distinguished *Bradley* and applied the 1978 amendments prospectively only. It did so offering alternative rationales. First, the Court noted that it

> has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional.

Id. (quoting *Bradley*, 416 U.S. at 720). Further, the *Bennett* Court discussed the evidence of congressional intent, and noted that it did not appear that Congress "intended the substantive standards of the 1978 amendments to apply retroactively." 470 U.S. at 641. But most pertinently to the overarching question of the primacy of the *Bowen* presumption or the *Bradley* pronouncement, the *Bennett* Court stated that the limitation quoted above from the *Bradley* opinion "comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U.S. at 639, citing *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene v. United States*, 376 U.S. 149, 160 (1964).

The Supreme Court in *Bennett* did not purport to overrule *Bradley*. But it noted that the *Bradley* decision concerned allowance of attorney fees, while acknowledging the continued vitality of "the venerable rule of statutory interpretation" followed in *Security Industrial* and *Greene* as applicable to "substantive rights and liabilities." 470 U.S. at 639. Therefore, we conclude that the Court has given us the basis upon which we must now distinguish the applicability of the two presumptions. The *Bowen*

presumption must apply in the case of changes in substantive law. That being said, and *Bradley* still apparently being recognized by the Supreme Court, we agree with the Fifth Circuit that the *Bradley* presumption of applicability of law as of the time of decision must pertain to "remedial provision[s]—not substantive obligations or rights under a statute." *Uncle Ben's*, 965 F.2d at 1374 (citing *Bennett*, 470 U.S. at 639).

The provision before the Court in *Bradley*, as noted in *Bennett*, applied to a remedy, not to the rights of the parties. The rights of the parties were the same before and after the change. The statutory amendment enlarged only the remedy. Likewise, in *Thorpe*, the amending statute altered procedural, not substantive, rights. Landlords had the same rights and limitations on eviction of tenants as before, but the required procedures had changed.[6] Not so in the present case. In *Johnson v. Uncle Ben's, Inc.*, the Fifth Circuit stated:

> Section 101 affects substantive antecedent rights. Under *Patterson*, § 1981 did not prohibit discrimination in promotions before the enactment of § 101.

---

[6] We recognize that this is not a wholly satisfactory distinction. To call the change in *Thorpe* "procedural" as opposed to "substantive" ignores the proposition suggested by Justice Scalia in his *Kaiser Aluminum* concurrence that "*Thorpe* could not possibly have come out the way it did under prior law." 494 U.S. at 848-49. Nonetheless, given the present guidance from the Supreme Court, and the continued vitality of the two lines of authority, we see no other resolution. Though the substantive/procedural distinction is imperfect, it at least recognizes the Supreme Court's authority to interpret past and present law, and offers a standard for resolving retroactivity disputes on objective grounds. Adopting the "reasonable expectations test" advocated by the dissent would only promote unpredictable and subjective analyses. How this distinction and the *Bradley* exception for "manifest injustice" play out in the context of such major, though arguably remedial, changes as the right to jury trial and expanded damages under § 102(b) and (c) of the 1991 Act is for another day and another case, perhaps *Van Meter, supra*.

> Section 101 extended § 1981 to such discriminatory conduct. We then presume that § 101 does not apply to conduct that occurred before its enactment, absent clear evidence to the contrary. There is no such clear evidence.

965 F.2d at 1374.

Likewise here. Under *Patterson*, § 1981 did not prohibit discrimination in termination of contracts. *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565, 1571. Section 101 extended § 1981 to that discriminatory conduct. Like the Fifth Circuit, we presume that a substantive statutory change such as § 101 does not apply to conduct that occurred before its enactment, absent clear evidence of congressional intent to the contrary. As we demonstrated above, there is no such clear evidence.

The fact, stressed by the dissent, that the conduct involved here occurred before the decision in *Patterson* is of no legal effect. It simply cannot be the law that retroactive application of a statute is governed by whether or not the parties reasonably, but mistakenly, believed that the law at the time of their conduct was what the law later became. One obvious problem with such a rule is that there is no way of determining in most cases what the parties mistakenly believed the law to be at the time of their conduct. Indeed, this is such a case. The dissent states, "because the new law was the same as what the parties reasonably understood the law to be before *Patterson*, there is no reason not to apply § 101 retroactively." Dissent at 16. Our colleague does not, however, explain how she knows what Group Health understood the law to be at the time of its termination of the contract with Gersman.

The Fifth Circuit dealt with this same argument in *Uncle Ben's*, and dispatched it quickly.

> As a matter of law, the rule announced in *Patterson* applies retroactively to UBI's conduct in 1974.

> *Lavender v. V. & B. Transmission & Auto Repair*, 897 F.2d 805, 806-07 (5th Cir. 1990). *Cf. James B. Beam Distilling Co. v. Georgia*, —— U.S. ——, 111 S. Ct. 2439, 115 L.Ed.2d 481 (1991). UBI is just as entitled to the preservation of its substantive interests under this rule as litigants whose conduct occurred after *Patterson* was decided. Any other holding would require unwieldly distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating the Civil Rights Act of 1991. We decline to embark on such an inquiry.

965 F.2d at 1374.

Other than substituting GHA for UBI and a citation from this Circuit—the original opinion in this case, 931 F.2d at 1565—for *Lavender*, we merely join the language of our sibling circuit. *See also Luddington v. Indiana Bell Telephone Co.*, 966 F.2d at 229-30.[7]

Nor do we share our dissenting colleague's apparent conclusion that the Fifth Circuit in *Landgraf v. USI Film Products*, 91-4485, 1992 U.S. App. LEXIS 17414 (5th Cir. July 30, 1992), retreated from its application of *Bowen* in *Uncle Ben's*. The *Uncle Ben's* panel concluded as we do today that the Supreme Court in *Bennett* impels us toward the conclusion that the *Bowen* presumption of prospective application of statutory amendments, not the *Bradley* presumption of retroactive application, applies in cases where the substantive law

---

[7] We would further note that it is far from altogether clear that the law before *Patterson* was universally perceived to be contrary to the *Patterson* holding. Every case the dissent cites from either the Supreme Court or this Circuit is offered for its dicta. There was apparently no holding upon which the parties could have relief, even if their reliance were relevant. *See Luddington v. Indiana Bell Telephone Co.*, 966 F.2d at 229 ("the pre-*Patterson* 'legal regime' . . . was merely a set of lower-court decisions, constituting a stab in the dark concerning issues on which the Supreme Court had not yet ruled.").

is changed. 965 F.2d at 1372-74. The language quoted from *Landgraf* by our colleague is not to the contrary. True, Judge Higginbotham (also the author of the *Uncle Ben's* decision) did state for the court "the measure of manifest injustice under *Bradley* is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties." *Id.* at *16-*17. However, he did so, not in the context of determining which of the two conflicting presumptions applied, but rather to demonstrate that on the facts of the *Landgraf* case it did not matter. The amendments in question there would apply only prospectively in either event.

More specifically, the *Landgraf* panel was considering at that point whether § 102(3)(b)(3), substantially expanding compensatory and punitive damage awards available in Title VII cases, would apply to pre-Act conduct. As the substantive-remedial distinction drawn in *Uncle Ben's* might lead to the conclusion that the *Bradley* presumption in favor of retroactivity would apply, Judge Higgenbotham was pointing out that even if it did, its own built-in exception for "manifest injustice" would lead to prospective application of the amendment.

SUMMARY AND CONCLUSION

It is the general rule that substantive statutory amendments do not apply to pre-amendment conduct. This holding is consistent with *Bradley* and *Thorpe*, which dealt with remedial and procedural amendments. The present case concerns a substantive amendment and pre-amendment conduct. The rights of the parties must be adjudicated as they were under the law prevailing at the time of the conduct. Therefore, we adopt our prior decision in *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991). The decision of the District Court is

Affirmed.

WALD, *Circuit Judge*, dissenting: I agree with my colleagues that Congress' intention is unclear with respect to whether § 101 of the Civil Rights Act of 1991 ("Civil Rights Act" or "Act"), Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72, should apply retroactively to cases pending at the time it became effective. I also agree that *Bradley v. School Board*, 416 U.S. 696 (1974), remains the law and until a majority of the Supreme Court informs us otherwise, we must continue to apply it. Finally, I concur that, to say the least, the Supreme Court's guidance on retroactivity has not been all of one piece, *compare Bradley*, 416 U.S. at 715 ("[W]e must reject the contention that a change in the law is to be given effect in a pending case only when that is the clear and stated intention of the legislature.") *with Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language plainly requires this result."), and that clarification of the proper principle of construction by the Court would aid us in deciding cases such as this one. I part company with my colleagues, however, on how best to reconcile *Bradley* with the cases that have come after it and, thus, on how to apply the "*Bradley* presumption" to the case before us. I conclude that the most satisfactory—although admittedly not the only defensible—reconciliation of the post-*Bradley* cases requires us, in the absence of a contrary direction from Congress, to apply the law in effect at the time we render our decision, unless we conclude that Congress would not intend us to apply the "new" law because that would upset the reasonable expectations of the parties concerning the legal consequences of their conduct at the time they acted. Because the law prior to the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), with respect to § 1981's applicability to post-formation conduct was substantially identical to the law as enacted in § 101 of the Civil Rights Act, the retroactive application of that section to the parties in this

case would not undermine the parties' reasonable expectations concerning the rights and obligations arising out of their conduct in October 1987. Accordingly, I dissent from the majority's holding that § 101 does not apply to the facts of this case.

I.

In *Bradley*, the Court relied on "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711. The question before the Court was whether § 718 of Title VII of the Emergency School Aid Act, which grants authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case, applied to cases pending on the effective date of the enactment. The amendment was passed while *Bradley* was pending before the court of appeals; after rehearing the case en banc, the appellate court decided that the attorney's fee amendment applied only to legal services rendered after the effective date of the Act.

Th Supreme Court unanimously reversed. The Court read *Thorpe v. Housing Authority*, 393 U.S. 268 (1969), to stand for "the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley*, 416 U.S. at 715. According to the Court, the *Thorpe* rule applies in the absence of clear legislative intent to the contrary or the need to prevent "manifest injustice." *See id.* at 715-16. Explicating the latter exception, the *Bradley* opinion indicated that

> [t]he concerns expressed by the Court in *Schooner Peggy* and in *Thorpe* relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights.

Id. at 717. The *Bradley* Court then applied those criteria to the case before it. It first determined that the case was of more than private concern and that, with respect to the plaintiffs, the defendants were disproportionately able to protect their interests. *See id.* at 718-19. Moving to the second criterion, the Court emphasized that there was no danger "that injustice may arise from retrospective application of a change in law" because § 718 did not affect any right "that had matured or become unconditional." *Id.* at 720. Finally, the Court noted that this was not a case "where new or unanticipated obligations," *id.*, were imposed on parties because the new law "merely serve[d] to create an additional basis or source for the Board's potential obligation to pay attorneys' fees." *Id.* at 721.

Bradley's discussion of the principles governing retroactivity suggests that the Court's primary concern about the potential for injustice stemming from retroactive application of legislation revolves around the effect that such an application would have on the reasonable expectations of the parties concerning the nature of their rights and obligations at the time they acted. Thus, I believe that the core principle of *Bradley* may be summarized as follows: A court will presume, absent clear statutory language or legislative history to the contrary, that courts should apply the law in effect at the time they render their decisions, unless Congress would not intend the retroactive application of the new law because that would work an unfairness by upsetting the expectations of the parties concerning the legal consequences of their past conduct. As Judge Higginbotham has recently said, "The measure of manifest injustice under Bradley is not controlled by formal labels of substantive or remedial changes. Instead, we focus on the practical effects the amendments have upon the settled expectations of the parties." *Landgraf v. USI Film Products*, No. 91-4485, 1992 U.S. APP. LEXIS 17414, at *16-*17 (5th Cir. July

30, 1992).[1] This principle is also consistent with the cases that have come after *Bradley*, even though some of those decisions have spoken in different terms.

My colleagues, however, disagree with me as to the effect of later cases on *Bradley*'s core principle. Specifically, they argue that the *Bradley* presumption was narrowed by *Bennett v. New Jersey*, 470 U.S. 632 (1985), to apply only to procedural matters. In *Bennett*, the question was whether certain amendments relaxing the substantive standards for determining whether receipients misused federal educational grants should apply retroactively to grants made prior to the amendments. In a 6 to 2 decision, the Court reversed the decision of the Court of Appeals that had applied the new substantive criteria retroactively, concluding that "absent a clear indication to the contrary in the relevant statutes or legislative history, changes in the substantive standards governing federal grant programs do not alter obligations and liabilities arising under earlier grants." *Id.* at 641. Justice O'Connor stated that "reliance on [the *Bradley*] presumption in this context is inappropriate," *id.* at 638, because "[b]oth the nature of the obligations that arose under the Title I [of the Elementary and Secondary Education Act of 1965] program and *Bradley* itself suggest that changes in substantive requirements for federal grants should not be presumed to operate retroactively." *Id.* The Court recognized that *Bradley* had expressly acknowledged limits to the "general principle that a court must apply the law in effect at the time of its decision":

> "The Court has refused to apply an intervening change to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become un-

---

[1] I do not, as the majority opinion mistakenly suggests, *see* Majority Opinion ("Maj. Op.") at 28, cite this quotation for anything other than what it says on its face.

> conditional." [*Bradley*, 416 U.S.] at 720. This limitation comports with another venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.

Bennett, 470 U.S. at 639.

My colleagues have interpreted this passage from *Bennett* as having effectively modified the *Bradley* presumption such that it would henceforth not apply to statutes affecting substantive rights. Ordinarily, of course, such a change would make little difference: a law that affects substantive rights of the parties, if applied retroactively, will usually also upset the reasonable expectations of the parties concerning the legal consequences of their past conduct. But not always. In this instance, for example, there is no question that § 101 of the Civil Rights Act "affects substantive rights," but there is also little doubt that the reasonable expectations of the parties concerning the legal consequences of terminating a contractual relationship back in October 1987 on the basis of race included a possible cause of action under § 1981.[2] By reading *Bennett* and its gloss on *Bradley* to suggest that the inquiry ends when it is determined that the "new" law affects substantive rights, my colleagues transform an exception requiring a realistic appraisal of the dislocations that retroactivity may cause into a rather hollow, formal distinction between substantive and procedural or reme-

---

[2] Conversely, while remedial or procedural changes do not generally upset expectations, in some cases they may. *See Landgraf v. USI Film Products*, No. 91-4485, 1992 U.S. APP. LEXIS 17414 (5th Cir. July 30, 1992) ("There is a practical point at which a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself."); *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229 (7th Cir. 1992) (Posner, J.) ("[Remedial, procedural, or evidentiary] changes can have as profound an impact on behavior outside the courtroom as avowedly substantive changes.").

dial changes in the law. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 853 (1990) (Scalia, J., concurring) ("I suppose it would be possible to distinguish between statutes that alter 'substantive rights and liabilities' directly, and those that do so only by retroactively adding a procedural requirement, the failure to comply with which alters the 'substantive rights and liabilities'—but I fail to see the sense in such a distinction."); *cf. Rowe v. Sullivan*, No. 91-4675, 1992 U.S. APP. Lexis 17706, at *20 (5th Cir. Aug. 5, 1992) (indicating that the Act's change in a Title VII statute of limitations period "has substantive attributes" because it would revive a right that would otherwise be extinguished); Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991*, 90 MICH L. REV. 2035, 2062 (1992) (noting that the "lack of content to the distinction" between substance and process leads to contradictory results in similar cases). This formal distinction has no inherent connection to the value, the prevention of injustice through disturbance of reasonable reliance, that causes courts to pause before declaring new rules retroactive. *Cf. James B. Beam, Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2443 (1991) (Souter, J., joined by Stevens, J.) (noting that retroactivity of judicial decisions has been "attacked for its failure to take account of reliance on cases subsequently abandoned"). Further, in the circumstances of this case, my colleagues' criterion actually thwarts the attainment of what they correctly refer to as the "obvious[ly] salutary result that persons may know when they act the legal consequences of their action." Maj. Op. at 23; *see also* Estrin, Note, *supra*, at 2072-73 (1992) ("Congress restored the values and understandings developed over twenty-five years of federal court interpretations. These long-standing expectation interests and their subsequent reaffirmance by Congress outweigh the interests which arose during the two-year break with the past. . . . [T]h[e] decisions [overturned by the Act] disrupted expectations to a far greater

extent than the restorative Civil Rights Act."). The majority's rule foists a legal regime on the parties that they could not have "known," much less relied upon, when they acted.

We would have to accept such an unfortunate result if *Bennett* clearly mandated the interpretation that the majority gives to it. In fact, however, their reading is not preordained and requires them to ignore several significant aspects of the *Bennett* decision.

First, it is clear from *Bennett* that the Court explicitly focused on *Bradley*'s concern with vested rights and the parties' expectations—what I have referred to as *Bradley*'s core principle—in analyzing the effect of a retroactive change in the substantive requirements to receive a federal grant. In concluding that such a change would impermissibly undermine the parties' expectations, the Court explicitly noted that the Department of Education's "right . . . had matured or become unconditional because grant programs are 'much in the nature of a contract,' " *id.* at 638 (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). The "State chose to participate in the Title I program and, as a condition of receiving the grant, freely gave its assurances that it would abide by the conditions of Title I,' " *id.* at 638-39 (quoting *Bell v. New Jersey*, 461 U.S. 773, 790 (1983)). Following *Bradley's* lead, the Court concluded that the normal presumption in favor of current law should not be applied in such circumstances, for it is not reasonable to presume that Congress intended to rewrite the terms of the grant program and thereby upset the expectations of the Department of Education as to the obligations of the State of New Jersey at the time the funds were allocated. In sum, the Court explicitly referred to and applied the unadulterated *Bradley* rule and recognized that the facts of *Bennett* fell clearly within the articulated exception to the *Bradley* presumption.

Second, my colleagues treat the Supreme Court's allusion to the "venerable rule" distinguishing substantive rights from procedural or remedial rights as the crucial consideration in the Court's ruling in *Bennett*. Thus, they read the opinion as a reformulation of *Bradley*'s concerns about disturbing settled interests into the formal distinction between substantive and other laws, and then find that the Court intended the formal distinction to replace any individualized inquiry into the justice of applying a substantive rule retroactively. But Justice O'Connor did not simply refer to that "venerable rule of construction," decide which side of it the case fell on, and put down her pen. Rather, she immediately proceeded beyond her reference to that formal distinction to look at the "[p]ractical considerations" that suggested that changes in federal grant programs should not be retroactive. *Id.* at 640. After reviewing the real effect that retroactive application would have in the circumstances presented, the Court proclaimed that "[r]etroactive application of changes in the substantive requirements of a federal grant program would deny both federal auditors and grant recipients fixed, predictable standards for determining if expenditures are proper," and would be "unworkable." *Id.* Thus, it was not simply that the changes were substantive—and, as noted above, would have disturbed reasonable expectations and thus fallen within *Bradley*'s exception—but also that such changes would cause practical difficulties *in the specific circumstances* presented to the Court that led to its conclusion. Given *Bennett*'s consistent approach of looking at the specific effects retroactivity would have on expectations and sensible administration, that case should not be construed as relying on a bright line rule that considers the finding that a law is "substantive" conclusive without further inquiry.

Third, contrary to the majority's assumption, the Court in *Bennett* never stated that the exception to *Bradley* was *identical* to the principle that statutes effecting substan-

tive rights will always apply prospectively. *Id.* at 639. Instead, the Court stated only that the exception to the *Bradley* presumption "*comports with* another venerable rule of statutory interpretation." *Id.* (emphasis added). The Court simply noted that the exception to the *Bradley* presumption and the "[]other venerable rule" were *consistent.* And, while they are consistent, the focus on vested rights and expectations underlying *Bradley* is narrower than the "venerable rule" that presumes that all changes in substantive rights and liabilities are only to be applied prospectively. If the *Bennett* Court had really intended to expand *Bradley*'s exceptions to include all substantive laws, as my colleagues suggest, rather than simply to point out that the exception is consistent with other rules of statutory construction, it could certainly have made that clearer.[3]

---

[3] Finally, even if the *Bennett* Court meant to say that the *Bradley* exception was coextensive with the rule of construction it identified, the breadth of the "venerable rule" the Court intended to incorporate is open to question. The cases cited by the *Bennett* majority for the proposition that legislation affecting "substantive" rights is presumed to be prospective are all vested-rights cases. Thus, the class of "substantive" rights that *Bennett* intended this rule to apply to may not have been any broader than the set of cases where parties had settled expectations of unconditional rights. In *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982), the Court held that section 552(f)(2) of the Bankruptcy Reform Act of 1978, which permits debtors to avoid liens on certain property, does *not* apply retroactively to liens which attached prior to the enactment date. The Court determined that section 552(f)(2) "could be read literally to divest property interests which had been created before the Act was enacted," *id.* at 80, but it declined to do so. This case supports a supposition that the Court intended the "venerable rule" identified in *Bennett* to apply narrowly. The rights implicated in *Security Industrial Bank* were precisely those that *Bradley* identified as having "matured or become unconditional." It would be unfair, even under a narrow reading of the exception to the *Bradley* presumption, to upset these rights by the retroactive application of the law.

The only other case cited as a source of the "venerable rule" is *Greene v. United States*, 376 U.S. 149 (1964). In *Greene*, the Court

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), also does not alter the conclusion that the core principle of *Bradley* is still the law of the land and applies to both substantive and procedural legislation. In *Bowen*, the Court considered whether the Department of Health and Human Services ("HHS") had the power retroactively to change the method of calculating the "wage index" factor used to compute hospital reimbursements under Medicare. The Court reasoned that since an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress, the validity of HHS's retroactive wage-index rule depended on whether the Medicare Act authorized retroactive rulemaking. The Court concluded that it did not. In support of that position, the Court stated:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will

---

considered whether a new 1960 Defense Department regulation, which changed the qualifications for receiving monetary reimbursement by a contractor employee who had been wrongfully denied a security clearance by the Defense Department, would apply to a case pending at the time it was issued or whether the 1955 regulation continued to apply. The Court held that "[w]hatever petitioner's rights are, *there can be no doubt they matured* and were asserted under the 1955 directive." *Id.* at 160 (emphasis added). *Greene* had been cited by the Court in both *Thorpe*, 393 U.S. at 282, and in *Bradley*, 416 U.S. at 717 n.24, 720, as an example of the exception to the general rule that courts are to apply the law in force at the time of their decisions. Because *Greene*'s rights to his lost earnings had matured under the earlier regulation, it would be "manifestly unjust" to apply the new regulation retroactively. Thus, *Greene* also supports a narrow understanding of the substantive rights that *Bennett* understood the venerable rule to apply to. In light of the reference to these cases, one could plausibly interpret the venerable rule that *Bennett* meant to incorporate to be quite similar to the more limited exception to the *Bradley* presumption that a court should not apply a new law where such "an intervening change to a pending action . . . would infringe upon or deprive a person of a right that had matured or become unconditional," *Bradley*, 416 U.S. at 720 (citing *Greene*, 376 U.S. at 160).

> not be construed to have retroactive effect unless their language requires this result. By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.

Id. at 208 (citations omitted).

This broad dicta could indeed be cited for the proposition that *all* statutes— whether categorized as substantive or not—ought to be presumed to apply only prospectively, but it is significant that the Court itself has not subsequently concluded that this absolutist statement from *Bowen* is the final word on retroactivity. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) (recognizing only that *Bradley* and *Bowen* are in apparent tension"); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661 n.1 (1989) (relying on *Thorpe* for legal support for parties' concession that regulations should apply to that case). My colleagues, as they must, have also recognized that it is not our place to determine when one Supreme Court decision constructively overrules another, *see Rodriquez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), and have determined that *Bowen* does not provide the governing rule for this case.

Apart from its dicta, *Bowen* is entirely consistent with the *Bradley* presumption; its facts simply fit within the exception for statutes that would alter the reasonable expectations of parties regarding the consequences of their past actions. A court ought not to presume that Congress intended, by authorizing HHS to promulgate rules, to permit the Secretary to apply those rules retroactively in a way that would upset the settled rights and expectations of the provider hospitals. The HHS rule in question "alter[ed] the *past* legal consequences of past

actions," *id.* at 219 (Scalia, J., concurring) (emphasis in original) and upset the plaintiffs' reasonable expectations of how much they would be reimbursed for providing medical care. *See id.* at 220 (noting that the agency rule violated the APA because it impermissibly upset reliance on past—as opposed to future—legal rules).

Obviously, *Bowen*'s conclusion is also consistent with the substance/procedure dichotomy that the majority draws. Yet, given that the Court in *Bowen* did not purport to rely on such a distinction, we are also free to apply *Bradley*'s core principle and look directly at whether retroactive application would upset reasonable expectations. Given the choice between the two, I believe that we should employ the *Bradley* rule because, as I have argued above, it best comports with the fundamental concerns underlying retroactivity law and avoids the inevitable inaccuracies engendered by reliance on the formal substantive/procedural distinction. At best the substance/procedure dichotomy is a proxy for a direct examination of the justice of applying a new law to prior conduct in all cases, and I see no reason to use a proxy when *Bradley* provides us with the tools to make that determination directly.

The last of this line of Supreme Court cases also does not conflict with the continued use of the *Bradley* presumption. Despite Justice Scalia's exhaustive consideration of the retroactivity issue in his concurrence in *Kaiser Aluminium & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), his effort to do away with the *Bradley* presumption did not carry the day. The four Justices signing on to Justice O'Connor's majority opinion agreed that Congress clearly intended for the new law to apply only prospectively, and they did not feel it necessary to reconcile the line of cases in "apparent tension," because in either case, "where the congressional intent is clear, it governs." *Id.* at 837. The four dissenters in *Bonjorno* not only disagreed with the majority's reading of the

statutory language and legislative history but reaffirmed their commitment to *Bradley* by applying it to the facts before them. *See id.* at 866-69 (White, Brennan, Marshall, & Blackmun, JJ., dissenting) (arguing that there is no manifest injustice in applying new post-judgment interest rate retroactively).

Finally, there are two recent cases in this circuit that have considered the presumption of retroactivity in the absence of clear legislative intent. In *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), this court discussed whether the 1988 version of § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which prohibited the making of false statements about one's competitor's products as well as about one's own, should be applied to conduct occurring well before the effective date of the amendments. Alpo Petfoods alleged only that Ralston Purina made false representations about its own products, so the amendment, even if considered applicable, would have had no effect on the case. Nonetheless, the court included a long footnote of dicta in which it stated that the *Bowen* rule that congressional enactments will not be construed to have retroactive effect unless their language requires this result "seems more faithful to the older decisions that are being interpreted in the retroactive debate." *Id.* at 964 n.6.

Even had the retroactivity discussion been relevant to the outcome of *Alpo Petfoods*, the case clearly would have fallen within the recognized exception to the *Bradley* presumption. Had Alpo actually accused Ralston Purina of misrepresenting Alpo's products, applying the law retroactively would have affected the parties' expectations about the legal consequences of their actions. It would have been unfair to Ralston Purina to apply a new rule to past conduct—conduct that, when it occurred, did not violate the Lanham Act. Under *Bradley*, a court would not presume that it was Congress' intention to work such an unfairness.

More recently, in *Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), this court interpreted a provision of the Superfund Amendments and Reauthorization Act of 1986 that provided for reimbursement of the reasonable costs of complying with a clean-up order. The question was whether the provision applied to clean-up orders issued prior to the effective date of the amendments. The court concluded that the statutory provision was ambiguous, so it deferred to the EPA's interpretation under Step II of *Chevron*. The court reasoned that the "obvious starting point for interpretation is the presumption against retroactivity" as articulated in *Bowen*. *Id.* at 924. It makes no mention of *Bradley*. But, like *Alpo Petfoods*, the provision at issue would, most likely, have fallen into the exception to the *Bradley* presumption. When Wagner Seed received the EPA's clean-up order, it had no expectation that it would be reimbursed for its costs. Indeed, the EPA fully expected that it would not be required to reimburse Wagner Seed for its clean-up of the hazardous wastes. By applying the reimbursement rule retroactively, the court would have upset the reasonable expectations of the parties concerning their rights and obligations under the law. Courts ought not to presume that such a frustration of reasonable expectations was the intended result.

The facts of both *Alpo Petfoods* and *Wagner Seed* fall comfortably within a clear exception to the *Bradley* presumption. Thus, to the extent that we are bound by them, *see* Maj. Op. at 22, they are consistent with the conclusion that the presumption remains the law in this circuit.

II.

When a law purports to restore the status quo in existence prior to an intervening Supreme Court decision, the application of that law to conduct occurring prior to the decision would obviously not frustrate the expectations of

the parties concerning the legal consequences of their actions at that time. To be sure, a court's authority to declare what the law *is* now has generally been held to include retroactively changing what the substantive law *was* before the court made its decision. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *69 (the duty of a court is not to "pronounce a new law, but to maintain and expound the old one"), *But see Linkletter v. Walker*, 381 U.S. 618, 636 (1965) (rejecting automatic retroactivity in favor of balancing approach in which courts must examine (1) the purposes of the new rule; (2) the reliance placed upon the old rule; and (3) "the effect on the administration of justice of a retrospective application" of the new rule). When the Court determined in *Patterson* that post-formation conduct was not actionable under § 1981, it changed the substantive law applicable to Gersman and to GHA even though § 1981 had not been interpreted that way at the time GHA terminated the contract. *See* Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 2 (1960) ("The parties acted yesterday but the law at which the court arrives today is the law which nonetheless covered yesterday's conduct."). This type of retroactive application of a Supreme Court decision is often unfair to parties that reasonably relied on their understanding of the law at the time they acted, but it is an unfairness that we tolerate for reasons of judicial administration and in order to preserve the "legal fiction" that courts do not make law and the practical discipline that many believe that fiction produces. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2451 (1991) (Scalia, J. joined by Marshall, J. and Blackmun, J., concurring in the judgment) ("[T]hose difficulties [engendered by retroactivity] are one of the understood checks upon judicial law making; to elimninate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the balance of responsibility and power among the three Branches."); *Levy*,

supra, at 26 ("Neither the force nor the value of our inherited judicial methods should be underestimated. They are an implicit and constant discipline to any judge who might feel egocentrically licensed to go on a legislative rampage.").

But Congress need not share our tolerance of this unfairness. The fact that *Patterson* through a legal fiction retroactively changed the substantive law governing past conduct should not lead us to the conclusion that when Congress legislated, its intent was to defer to that fiction. Put another way, we should not assume that Congress accepts the unfairness caused by the retroactive application of a court decision when it seeks to reverse the effects of that very decision. Congress knows that, *Patterson* notwithstanding, parties like Gersman and GHA had certain reasonable expectations about the legal consequences of their actions back in 1987. Unless there is reason to believe otherwise, we should assume that Congress, when it legislated to restore the pre-*Patterson* status quo, intended to restore the rule that people actually governed their own affairs by. *See* Estrin, Note, *supra*, at 2071 ("When Congress restores the unsettling effects of unexpected judicial decision, it provides stability and continuity to the law. . . .").

All of this is a long way of saying that, if anything, the specific circumstances in which Congress enacted the law—the fact that the Civil Rights Act followed on the heels of *Patterson* and attempted to undo that decision—confirms that *Bradley*'s generally applicable tenet that Congress should be presumed to act retroactively to the greatest extent consistent with reasonable expectations is the right canon to apply to this case, and that that canon leads us to the conclusion that § 101 should apply to this case. When the "new" law is nothing more than a reenactment of the law that governed the relevant conduct at the time it occurred, there is no "manifest injustice" in applying the new law to the past conduct, even where an intervening Supreme Court opinion redefined the sub-

stantive law. To the extent that the law prior to *Patterson* was the same as the law enacted in the Civil Rights Act, the application of § 101 of the Act to the facts of this case would not be "manifestly unjust," and the *Bradley* presumption should govern. Because the new law was the same as what the parties[4] reasonably understood the law to be before *Patterson*, there is no reason not to apply § 101 retroactively.

A. *Supreme Court Precedent*

The Supreme Court's pre-*Patterson* guidance supports the proposition that the conduct at issue here would have violated § 1981, as it was interpreted before *Patterson*. In his *Patterson* dissent, Justice Stevens wrote that the

> Court's repeated emphasis on the literal language of § 1981 might be appropriate if it were building a new foundation, but it is not a satisfactory method of adding to the existing structure. In the name of logic and coherence, the Court today adds a course of bricks dramatically askew from "the secure foundation of the courses laid by others," replacing a sense of rational direction and purpose in the law with an aimless confinement to a narrow construction of what it means to "make" a contract.

---

[4] Contrary to my colleagues' characterization, *see* Maj. Op. at 26-27, I do not suggest that the result in this case should turn on the subjective beliefs of these specific parties as to the rules governing their conduct. Rather, I believe that *Bradley* mandates an objective standard—that we must look to what these parties, and others similarly situated, could reasonably have believed the law to be at the time of their conduct. This is certainly not a novel inquiry for a court to make. For example, the Supreme Court's qualified immunity jurisprudence requires that courts routinely determine whether government officials "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Nor does such an inquiry lend itself to standardless determinations nearly as readily as the notoriously malleable substance/procedure dichotomy that the majority clings to. *See supra* pages 5-6.

Patterson, 491 U.S. at 222 (Stevens, J., dissenting). The "rational direction and purpose in the law" prior to *Patterson* clearly indicated that discriminatory conduct after the formation of a contract was actionable under § 1981.

In *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), the Court considered whether a timely filing of a Title VII complaint with the Equal Employment Opportunity Commission ("EEOC") under Title VII tolls the running of the statute of limitations for a § 1981 action based on the same facts. The petitioner, who was black, filed a charge with the EEOC claiming that he had been discriminated against with respect to the company's seniority rules and job assignments. Over three years later, the EEOC issued its right to sue notice.

The Court concluded that the filing of the Title VII claim did not toll the applicable statute of limitations for the § 1981 claim. The Court explicitly recognized, however, that § 1981 would otherwise have been applicable to petitioner's situation. "Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in "private employment on the basis of race." *Id.* at 459-60. Thus, at a minimum, *Johnson* suggests that the Court, prior to *Patterson*, believed that § 1981 applied to conduct occurring after the formation of an employment contract.

One year later, in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court considered whether two white employees stated a claim under § 1981 when they alleged that they had been fired for misappropriating company property while a black employee, who was accused of a similar offense, was not fired. The Court stated that "[w]e have previously held, where discrimination against Negroes was in question, that § 1981 affords a federal remedy against discrimination in private em-

ployment on the basis of race, and respondents do not contend otherwise." *Id.* at 285 (citing Johnson, 421 U.S. at 259-60). The Court went on to conclude that § 1981 applies to white employees claiming racial discrimination just as surely as it applies to black employees. More specifically, *McDonald* held that an allegation of a discriminatory *termination* of an employment contract states a cause of action under § 1981. *See id.* at 286-87.

As the *Patterson* Court recognized, however, § 1981 covers all types of contracts, not just employment contracts." *Patterson*, 491 U.S. at 183. The fact that the pre-*Patterson* case law governing contract terminations was largely developed in the employment context should not be interpreted as limiting § 1981's applicability to only certain kinds of contracts. *Patterson* itself has been interpreted to be applicable to cases outside the employment context, *see Gersman v. Group Health Ass'n*, 931 F.2d 1565, 1571 (D.C. Cir. 1991), so there is no justification for holding that the pre-*Patterson* case law is limited to employment contracts.

B. *Precedent from Other Circuits*

Further support for the argument that the law prior to *Patterson* considered non-employment discriminatory contract terminations to be actionable under § 1981 may be found in cases of the courts of appeals. In *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), the court considered whether plaintiff had a cause of action under § 1981 to challenge the decision of a private Baptist school to expel a white student for having a "romantic relationship" with a black student. The district court had dismissed the § 1981 claim on grounds that the school had a bona fide religious belief that the Bible forbids interracial romance and that actions based on that belief are insulated by the First Amendment absent a finding of a compelling state interest. The Court of Appeals phrased the issue as whether "§ 1981 prohibits a

commercially operated, private, sectarian school from discriminating on the basis of race, specifically, *by terminating a contractual relationship* with a white student at the school because of her association with a black student at the same school." *Id.* at 1149 (emphasis added). The Court concluded that § 1981 did proscribe the school's conduct. Further, although *Fiedler* involved a termination, the court found the case "virtually indistinguishable from *Runyon v. McCrary*, [427 U.S. 160 (1976),]" which had involved a denial of admission. *Id.* at 1150. To the court, the lone relevant distinction between the cases was the sectarian character of the school in *Fiedler*. *See id.*

In *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563 (7th Cir. 1989), the court affirmed the district court's grant of the defendant's motion for summary judgment, concluding that there was no genuine issue of material fact in dispute concerning the plaintiff's claim that her contract to provide cable marketing services to a cable franchise grantee had been terminated because she was black. The court affirmed the summary judgment because plaintiff had not proffered direct evidence of discriminatory intent. *See id.* at 571. The court never suggested, however, that § 1981 might not apply to plaintiff's claims of discrimination in the termination of the contract. Rather, the court assumed that § 1981 would apply to the termination of a contractual relationship.

In *Gonzales v. Home Insurance Co.*, 909 F.2d 716 (2d Cir. 1990), the court considered the effect of *Patterson* on plaintiff insurance agents' claims that the defendant insurance company had discriminated against them in the performance and termination of their agency contracts. Concerning pre-*Patterson* law, the court stated:

> Prior to *Patterson*, this Court and others had viewed discriminatory contract termination as falling within the prohibition of § 1981. The *Patterson* Court, though it did not otherwise address whether discrim-

> inatory termination is within the scope of § 1981, stated that the concept of contract formation does not encompass "breach of the terms of the contract." In the wake of *Patterson*, courts have divided as to whether a viable claim for discriminatory termination of a contract may still be brought under § 1981.

Id. at 722 (citations omitted). The court went on to hold that the "run-of-the-mine claim that the termination of plaintiffs' contracts was discriminatory . . . was properly dismissed in light of *Patterson*." *Id.* at 722. But the court's resolution makes it clear that such a claim would not have been dismissed prior to *Patterson*.

In *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), the court recognized that *Patterson* represented a clear break from prior law:

> In the end the [*Patterson*] Court decided not to overrule *Runyon*, but in the course of its widerranging reexamination of section 1981 indicated (as it seems to us) that claims of racially motivated *discharge* are not actionable under that statute. *This result could not reasonably have been anticipated before the order setting the case for reargument.*

Id. at 108 (emphasis added). Judge Posner, writing for a unanimous panel, described *Patterson*'s interpretation of § 1981 and its partial overruling of *Runyon* as "peculiar and unexpected." *Id.*

C. *D.C. Circuit Precedent*

Prior to *Patterson*, the law in this circuit was that discriminatory terminations of contractual relationships were actionable under § 1981. In *Banks v. Chesapeake & Potomac Telephone Co.*, 802 F.2d 1416 (D.C. Cir. 1986), this court considered whether the proper statute of limitations for a claim arising under § 1981 was the three-year limitation period on personal injury actions or the one-year limitation period provided in the D.C. Human

Rights Act. Appellant claimed that she had been discriminated against on the basis of both her race and her gender in the way she was trained, transferred, evaluated, suspended, and terminated. She originally had alleged violations of both Title VII and § 1981, but only her race discrimination claims under § 1981 were before the court on appeal. *See id.* at 1418 n.2.

The district court had determined that even under the three-year statute of limitations, appellant's claims were barred. We disagreed, concluding "that appellant's suit, insofar as it challenged her *termination*, was timely filed under the three-year statute." *Id.* at 1418 (emphasis in original and footnote omitted). There was no suggestion that § 1981 did not apply to the termination of the contract. On the contrary, Judge Buckley argued in concurrence that " 'causes of action that may be brought under § 1981 are mort analogous to *breach of contract* actions, employment grievances, and complaints for denial of the right to use public accommodations.' " *Id.* at 1439 (Buckley, J., dissenting in part) (quoting *Pender v. National R.R. Passenger Corp.*, 625 F. Supp. 252, 255 (D.D.C. 1985)) (emphasis added).

In a case decided four months before GHA terminated its contract with Gersman and CSI, this court affirmed a jury verdict awarding appellee reinstatement and back pay on her claim that she was forced to resign as a result of her employer's unlawful racial discrimination in violation of both Title VII and § 1981. *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465 (D.C. Cir. 1987). Appellant never argued, nor did the court even consider, that § 1981 might not apply to the *termination* of a private contractual relationship.

D. *Summary*

There can be no serious doubt that the law prior to June 1989—when *Patterson* was decided— was that § 1981 applied to the termination of private contracts. GHA filed

its motion to dismiss on August 7, 1989, one month after *Patterson*, but almost one year after it filed its answer (August 25, 1988). GHA obviously did not expect to win a motion to dismiss before *Patterson* changed the law. It would not be unjust to GHA if § 101 of the Civil Rights Act were applied to its conduct in October 1987, because under the law of the Supreme Court, as well as that of this circuit (and others), CSI had a cause of action against GHA under § 1981 for discrimination on the basis of race in the termination of the contractual relationship.

III.

Four other circuits have considered the question of whether certain parts of the Civil Rights Act of 1991 apply retroactively. In *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), the Sixth Circuit held that § 102 —which provides for the recovery of compensatory and punitive damages in cases of unlawful intentional discrimination—does not apply to cases filed prior to November 21, 1991, the effective date of the Civil Rights Act. Adopting a *Chevron* analysis, the court relied heavily on the fact that the EEOC had issued a policy statement declaring that it would not seek damages under the Civil Rights Act of 1991 for events occurring before November 21, 1991. *Id.* at 598 ("In light of the ambiguity of the statute on its face and the lack of congressional guidance, the EEOC's decision to apply the 1991 Act prospectively appears reasonable.").

Of course, *Vogel* dealt with a different section of the Civil Rights Act, and there is no reason to assume that the same retroactivity rules must apply equally to all sections of the Act. Indeed, any analysis under *Bradley* must take into account the specific effect that each statutory provision would have on settled expectations. That is especially true in the case of the Civil Rights Act, where the explicit prohibitions against retroactive application of § 105 to the *Wards Cove* case and of § 109 generally sug-

gest that Congress had no difficulty treating each section separately. Further, the EEOC policy statement to which the Sixth Circuit accorded such deference applies only to the retroactive imposition of damages. The argument for deference to the EEOC on the interpretation of the ambiguous damages provision further distinguishes that case from the one before us.

Finally, it is worth noting that the *Vogel* court had no reason even to consider the question of the retroactivity of the damages provision, for Vogel did not prevail on the merits of his constitutional challenge to the consent decree. His entitlement to damages obviously depended on his prevailing on the merits. The *Vogel* court's retroactivity discussion is essentially dicta.

The question of § 101's retroactivity was squarely (and necessarily) addressed by the Eighth Circuit in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992). Georgianna Fray claimed that her employer violated § 1981 when it failed to promote her and when it constructively discharged her. The court discussed the question under both *Bradley* and *Bowen*. Applying *Bradley*, the court recognized that "[t]his case does not fall within the 'manifest injustice' exception to *Bradley*'s presumption of retroactivity. Fray sought damages under § 1981 for discriminatory failure to promote and constructive discharge. The conduct at issue occurred before *Patterson, at a time when prior cases warned that such conduct could be actionable under § 1981.*" *Id.* at 1378 (emphasis added). The court stated further that the "retroactive application of § 101 to this pending case would neither alter the rights and expectations of the parties nor disturb previously vested rights." *Id.*

Nevertheless, the majority concluded that the President's veto of the 1990 version of the bill—and Congress' failure to override the veto—provided a sufficiently clear indication of a congressional intent against retroactive

application to preclude reliance on the *Bradley* presumption. "When a bill mandating retroactivity fails to pass, and a law omitting that mandate is enacted, the legislative intent was surely that the new law be prospective only; any other conclusion simply ignores the realities of the legislative process." *Id.*[5]

My colleagues and I agree that this argument based on the legislative history is untenable. The retroactivity provision contained in the bill that President Bush vetoed was a *super-retroactivity* provision—it would have applied § 101 "to all proceedings pending on or commenced after June 15, 1989," that is, it would have reopened cases in which judgment had entered prior to the effective date of the Civil Rights Act. The fact that the President vetoed this version (and that a two-thirds majority was unavailable to override) tells us nothing about the congressional intent concerning application of § 101 to cases pending on November 21, 1991.

In *Fray*, Judge Heaney argued in dissent that "[t]he Act's legislative history, even as the majority recounts it, clearly demonstrates that Congress was split on the question of retroactivity." *Id.* at 1380 (Heaney, J., dissenting). Judge Heaney sought to reconcile *Bradley* and *Bowen* by recognizing that they both are "based on an overriding concern for fairness." *Id.* at 1381. He concluded that a case involving civil rights, even among pri-

---

[5] The Eighth Circuit has subsequently relied on *Fray's* analysis to find that other sections of the Civil Rights Act do not apply retroactively. *See Parton v. GTE North, Inc.*, Nos. 91-3300, -3452, 1992 U.S. App. LEXIS 17551 at *12-*13 (8th Cir. July 31, 1992) (finding that 42 U.S.C. § 1981a(a)(1), which allows compensatory and punitive damages for intentional discrimination cases not covered by § 1981, is not retroactive); *Huey v. Sullivan*, No. 91-2908WM. 1992 U.S. App. LEXIS 11303, at *8-*9 (8th Cir. May 21, 1992) (finding that *Fray* prevents retroactive application of § 114 of the Civil Rights Act, which waived sovereign immunity for awards of interest under Title VII).

vate parties, was "[i]ndisputably a 'great national concern' that merits a presumption of retroactivity." Id. Finally, Judge Heaney, like the majority, concluded that

> [u]ntil the Supreme Court decided *Patterson* in 1989, there was every indication that the conduct that formed the basis of Fray's complaint was actionable under section 1981. During the period that Fray worked at the World Herald, the newspaper was on notice that section 1981 might apply to an employer's conduct over the course of the employment relationship. In this case, therefore, application of the Civil Rights Act of 1991 best serves the interests of fairness by restoring the rights of the parties as they were when Fray began her lawsuit.

Id. at 1381-82. The same, of course, could be said of GHA's conduct with respect to CSI and Gersman. The Fray majority's legislative history argument is entirely unpersuasive; when that is stripped away, as my colleagues and I agree that it should be, *Fray* supports the argument that applying § 101 to pre-*Patterson* conduct would not be unjust.

A few days before oral argument in this case, the Seventh Circuit decided *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992). There, the court first rejected the approach of the Eighth Circuit in *Fray*, concluding that "[a] clear indication of congressional intent cannot be deciphered from the legislative history of the 1991 Act's language. Without a clear indication of congressional intent in either the language of the 1991 Civil Rights Act or in the Act's legislative history, we must turn to judicially derived rules of construction in order to resolve this ambiguity." *Id.* at 934.

After acknowledging that "it is not within the province of the court of appeals to determine when Supreme Court decisions in one line of cases effectively overrule Supreme Court decisions in another line of cases," *id.* at 935 (citing

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989)), the court nonetheless overruled *Bradley* by implication:

> Considering that the *Bowen* presumption of prospective application is the historical rule of construction, and considering that the *Bowen* decision contains strong language reaffirming this historical rule of construction, we will assume that *Bowen* states the general rule. Therefore, we will only apply the *Thorpe-Bradley* presumption of retroactive application in a narrow category of cases.

Id. at 936.[6]

The court's evident preference for *Bowen* over *Bradley* led it to misread *Bennett*:

> [T]he *Bennett* decision could be read narrowly to mean that the *Thorpe-Bradley* line of cases does not apply to statutory provisions that affect matured property-like interests. However, considering that the *Bowen* presumption or prospective application is the general rule, we conclude that *Bennett*, instead stands for the proposition that statutory provisions impacting substantive rights and obligations will not be retroactively applied.

Id. The court believed that this broad reading of *Bennett* "assures that parties are accountable solely for the substantive law in effect at the time of their relevant conduct." *Id.* This is desirable because "it is unfair to hold private parties accountable for rules which were not in effect at the time in which the parties' relevant conduct

---

[6] In *Banas v. American Airlines, Inc.*, No. 91-1044, 1992 U.S. APP. LEXIS 17366 (7th Cir. July 29, 1992), the Seventh Circuit showed just how narrowly it intended to apply *Bradley*. There, the court said that *Bradley* would not be applied even where a new statute made a purely procedural change while the case was on appeal. *See id.* at *21.

took place." *Id.* This analysis, however, seems inherently contradictory since if the court were truly concerned about holding "parties accountable for rules which were in effect at the time" of their conduct, it would not have hesitated to apply § 101 of the Civil Rights Act to the parties in *Mozee*. As Judge Cudahy wrote in dissent,

> *Patterson* became the law for a short time as this case was inching through a thicket of litigation, and the opinion in this case as presently written assumes that it is still in effect. Now, however, Congress has chosen to erase *Patterson* from the books. So, as I write, the law is the same as that prevailing at the time the discriminatory events took place and at the time the lawsuit was filed. In other words, *Patterson* was the effective law of the land at no time that is relevant to the disposition of this case. *No one relied on it when liability was incurred in this case, nor can we rely on it now that it has been overruled by Congress.*

Id. at **36-37 (emphasis added).

One month later, the Seventh Circuit chose to revisit the identical issue that the *Mozee* court addressed. In *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992), Judge Posner concluded—somewhat at variance with the opinions he had expressed earlier in *McKnight*, *see supra* page 20—that the pre-*Patterson* legal landscape was "tentative," *id.* at 229, and that *Patterson* had "swept [it] away." *Id.* Additionally, according to the court, "it would be a considerable paradox to hold that the older the conduct complained of, the more securely the conduct is subject to the new statute." *Id.* Finally, Judge Posner expressed concern that it would be "too complex" and costly to administer a rule of retroactivity that depends on the date of the activity in question, and thus, on the parties' reasonable expectations. *See id.*

The rhetoric is seductive but the reasoning fallacious. First, Judge Posner's reading of the pre-*Patterson* law is unpersuasive. As demonstrated above, § 1981 jurisprudence was developed and consistent. Further, Judge Posner's reliance on the antiquity of the conduct is misplaced: the relevant inquiry is not age but the reasonable expectations of the parties at the time the conduct occurred. In a situation such as this one where legislation reverses a Court decision, it is inevitable that only the older conduct will be in reliance on the norm resuscitated by statute. Finally, *Luddington's* arguments based on costs and administrability are also unpersuasive. Applying the *Bradley* presumption would not revive cases in which judgment has already been entered and appeals exhausted or which are barred by applicable statutes of limitations. The class of cases affected—those pending on November 21, 1991, in which the relevant conduct occurred prior to June 15, 1989—is not enormous (nor particularly old). Administering a rule based on reasonable, objective expectations and determining whether rights had "vested" under a particular legal regime are tasks with which courts deal every day; in this case, the inquiry would merely require that the court ascertain the date of the conduct in question, the same determination that the court would have to make when following the majority's rule.[7] It is not clear that that endeavor is any more a waste of judicial resources than the continued application of the dying *Patterson* regime to any more pending cases than is equitably necessary. Lastly, even if the judiciary must undertake an extra burden,

[7] Application of *Bradley* would require that conduct be divided into three categories: conduct occurring before *Patterson*, conduct occurring after *Patterson* but before the passage of the Act, and conduct occurring after the passage of the Act. Under the majority's rule, conduct would be split into two categories based on whether it occurred before or after the passage of the Act. *Obviously*, in either case, a particular course of conduct could continue through more than one period and thus require the application of more than one rule.

costs and administrative difficulties are not trumps, and, in this case, they seem well worth bearing in the service of fairness and justice for the parties.

Finally, the Fifth Circuit has also weighed in on the issue of the retroactivity of § 101 of the Civil Rights Act. In *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992), the court, after finding the legislative history unenlightening and the Supreme Court's guidance conflicting, fell back on the same substantive/procedural divide that my colleagues invoke. *See id.* at 1373-74. Again like my colleagues, Judge Higginbotham relied heavily on *Bennett*, stating that "the rule in *Bradley* was *limited* by 'another venerable rule of statutory interpretation, i.e., that statutes affecting substantive rights and liabilities are presumed to have only retrospective effect.' " *Id.* at 1374 (quoting *Bennett*, 470 U.S. at 639) (emphasis added). While I have already addressed what I believe to be the limitations in this argument, it is perhaps worth noting that in order to reach the conclusion that this language from *Bennett* provides the controlling rule, the *Uncle Ben's* court must replace the actual "comports with" language with its own more definitive "limited" term.

The Fifth Circuit did recognize the "anomaly" in finding that § 101 was not retroactive in the face of the fact that at the time of the conduct at issue, "*Patterson* had not yet been decided and, under the decisions of many lower courts, § 1981 applied to racial discrimination in promotions." *Id.* The court justified its failure to take this fact into account on the grounds that the defendant was entitled to the benefit of the fiction of the retroactivity of *Patterson*, lest the court be required to make "unwieldy distinctions" between classes of litigants. *Id.* This argument ignores the fact that when Congress acts to restore the status quo—and thus parties' expectations—prior to the decisions, it is reasonable to presume that it meant to act retroactively. Additionally, the em-

phasis on "unwieldly distinctions" reprises Judge Posner's argument in *Luddington*, and the response is the same: drawing distinctions based on reliance is consistent with fairness to all the parties, is no different from the distinctions that the judiciary routinely makes, and is not measurably more awkward than interpreting and applying a legal regime that was only recently annouced and that will soon die.[8]

IV.

For the reasons discussed, I believe that § 101 of the Civil Rights Act should be applied retroactively to the facts of this case. It would not be unjust to apply § 101 because the parties back in 1987 must reasonably have expected that terminating a contractual relationship on the basis of race would have been actionable under § 1981. Because my colleagues, in their effort to fashion a bright line rule, have instead adopted a mechanical formulation that is at odds with the fairer and more fact-sensitive inquiry encapsulated in *Bradley*, I respectfully dissent.

---

[8] The Fifth Circuit decisions that have followed *Uncle Ben's* do not provide any more persuasive authority in regard to the issue in this case. In *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992), the court, relying on the Eighth Circuit's opinion in *Vogel*, deferred to the EEOC's opinion that the Act's provision extending the statute of limitations for filing judicial actions under Title VII was not retroactive. In *Landgraf v. USI Film Products*, No. 91-4485, 1922 U.S. APP. LEXIS 17414 (5th Cir. July 30, 1992), the court applied *Bradley* ot the Act's provisions regarding jury trials and the availability of compensatory and punitive damages but concluded that retroactive application would work an injustice. *See id.* at *13-*17.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 27, 1992

Mr. Michael J. Kator
1275 K Street, N.W.
Suite 950
Washington, DC 20005-4006

Re: Alan F. Gersman, et al.
v. Group Health Association, Inc.
No. 91-724

Dear Mr. Kator:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the Civil Rights Act of 1991.

Very truly yours,

/s/ William K. Suter
WILLIAM K. SUTER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 7, 1991 Decided May 7, 1991

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 88-01820)

David H. Shapiro, with whom *Richard A. Salzman* was on the brief, for appellants.

Anita Barondes, with whom *Christopher A. Weals* was on the brief, for appellees.

Before WALD, BUCKLEY and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting opinion filed by *Circuit Judge* WALD.

SENTELLE, *Circuit Judge*: Appellants Alan F. Gersman and Computer Security International ("CSI") appeal the district court's decision dismissing their claims against

Group Health Association, Inc. ("GHA") for lack of standing and for failure to state a claim under both § 1981 of the Civil Rights Act and the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2501 *et seq.* We find that appellant CSI had standing to bring the present claims, but agree with the district court's conclusion that appellant fails to state a claim under either statute. We therefore affirm the district court's dismissal of this case.

I. Background

Appellant corporation CSI is engaged in the business of providing commercial storage of computer software, as well as other software services. From 1983 until 1987, CSI maintained a contractual relationship with health maintenance organization GHA for storage and delivery of GHA's computer software. The original contract specified a one-year term, subject to renewal and modification. The terms of the original contract state:

> The initial term of this agreement shall be for 1 year. After expiration of the initial term, this agreement shall automatically renew for successive one month periods until terminated by either party upon receipt of written notice thirty days before the end of any of these successive periods. For renewal terms, notice of adjustment in the fixed charges shall be supplied in writing not less than forty-five (45) days prior to the renewal date at which the changes will take effect.

Thus, the initial contract governed the relationship from August 1983 until August 1984, and the contract continued to renew automatically on a monthly basis until GHA notified CSI that it was discontinuing the relationship in October 1987.

Appellant Gersman is the president of CSI; he and his wife are also CSI's only shareholders. According to Gers-

man, CSI and GHA maintained a healthy working relationship until late 1986, when Mohammed Ghafori became the manager of GHA's Management Information System. Gersman alleges that Ghafori had an assistant ask Gersman whether or not he was Jewish and, upon finding that he was, determined to end the contractual relationship between CSI and GHA for that reason. While GHA had been satisfied with CSI's service prior to that time, Gersman began hearing rumors that GHA was dissatisfied. He approached GHA's upper management, who admitted awareness of Ghafori's indirect inquiry, but maintained that there was no link between this inquiry and GHA's recent dissatisfaction. In a final effort to save the contract, Gersman proposed a modification to the contract with terms more favorable to GHA. However, in October 1987, GHA notified Gersman that it was ending its contractual relationship with CSI.

CSI and Gersman brought this action in the district court, alleging that GHA's actions violated both § 1981 of the Civil Rights Act and § 1-2511 of the DCHRA. The district court dismissed both claims upon a motion by GHA, on the grounds that appellants Gersman and CSI lacked standing to bring any discrimination claims against GHA, and that the complaint failed to state a claim under either statute. Appellants then filed this appeal.

II. Discussion

A. *Standing*

The district court held that neither Gersman nor CSI had standing to bring discrimination claims against GHA. First, the court determined that Gersman lacked standing because CSI, rather than Gersman, suffered the alleged injury, as it was CSI that had been party to the contractual relationship with GHA. With this we agree. The court then determined that CSI had suffered the alleged injury, but that CSI lacked standing to litigate that injury because a corporation had no racial identity and

therefore could not be a legally cognizable victim of discrimination. This we reject.

The court relied on dicta from the Supreme Court's opinion in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). There, the Court stated that "a corporation . . . has no racial identity and cannot be the direct target of the petitioners' alleged discrimination." *Id.* at 263. The district court found this assertion to be consistent with the nature of a corporation as a legally constructed entity with "an identity separate and distinct from that of its members or organizers."

The court implied that there may be exceptions where "a functional nexus exists between the purpose or activity of the corporation and the identity of the members of that corporation," citing the Second Circuit's opinion in *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.), *cert. denied*, 459 U.S. 857 (1982). In *Hudson Valley*, the Second Circuit held that a not-for-profit, tax-exempt theatre organization created to serve local black and Hispanic communities had standing to bring civil rights claims against county officials who allegedly denied the organization's funding application for racial reasons. The district court here ruled that even if the Second Circuit is correct, CSI gained no standing because "CSI does not serve to advance Plaintiff Gersman's racial or religious identity but simply his economic interests." Accordingly, CSI lacked a racial or religious identity and therefore had no standing to bring a discrimination claim against GHA.

In our view, however, the determination whether a corporation has a racial identity is not determinative of whether that corporation has standing to bring a discrimination claim. Rather than assume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm. As the Supreme Court

stated in *Warth v. Seldin*, 422 U.S. 490 (1975), the test for prudential standing "is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* at 500 (footnote omitted). Assuming 1981 and DCHRA § 1-2511 to be applicable, we believe that both provisions can be understood to provide relief to a corporate plaintiff.

The Supreme Court has held that a party need not be a member of a protected minority in order to suffer harm from discrimination. For example, in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), a white homeowner and member of the Little Hunting Park, a nonstock corporation that operated a playground and park in the neighborhood, rented a home to a black person and attempted to transfer his share in the Park to the tenant. The Park refused to approve the assignment because the tenant was black, and expelled the white homeowner from the Park for protesting the refusal. The Supreme Court held that the homeowner had standing to bring a § 1982 action against the Park, because the homeowner was "punished for trying to vindicate the rights of minorities protected by § 1982." *Id.* at 237. According to the Court, the homeowner must have standing to bring the § 1982 action because "the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant." *Id.* (citation omitted).

The Court relied on its earlier opinion in *Barrows v. Jackson*, 346 U.S. 249 (1953). In that case, a party to a restrictive covenant forbidding homeowners in the neighborhood from renting or selling their homes to non-Caucasians sued another party to the covenant for damages based on a breach of that covenant. The Supreme Court allowed the defendant to claim that the covenant violated the Fourteenth Amendment, even though the defendant herself was a white woman. The Court found that the woman had been injured by the discriminatory

covenant because the co-covenantor was seeking damages for breach of the covenant. *Id.* at 256. Moreover, the Court concluded that "[t]he relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand." *Id.* at 259. Accordingly, the Court concluded that "[s]he will be permitted to protect herself and, by so doing, close the gap to the use of his covenant, so universally condemned by the courts." *Id. See also Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) ("a [white] person has an implied right of action [under §§ 1981 and 1982] against any other person who, with a racially discriminatory intent, injures him because he made contracts with non-whites"); *see generally Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977) (white plaintiff had standing to sue employer under § 1981 when he was fired for protesting the allegedly discriminatory firing of a black employee); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified*, 520 F.2d 409 (2d Cir. 1975) (white plaintiff had standing to sue under § 1981 where he alleged his employer forced him into early retirement because he sold his home to a black person); *Faraca v. Clements*, 506 F.2d 956 (5th Cir.), *cert. denied*, 422 U.S. 1006 (1975); *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) (allowed white plaintiff to bring § 1981 claim against employer who allegedly refused to hire him because he was married to a black woman).

Here, appellant CSI alleges that it was harmed by the discriminatory actions of GHA. As the above cases have shown, a party may suffer a legally cognizable injury from discrimination even where that party is not a member of a protected minority group. Thus, it is not necessary to determine whether CSI has a "racial iden-

tity." Such a query would lead to difficulties of determining what, in fact, constitutes a racial identity. *See, e.g., T & S Service Associates, Inc. v. Crenson*, 666 F.2d 722 (1st Cir. 1981) (requiring corporate plaintiff to prove that it was a minority-owned firm in order to bring claim that it was denied contract under § 1981); *Howard Security Servs., Inc. v. Johns Hopkins Hosp.*, 516 F. Supp. 508 (D. Md. 1981) (allowed corporation owned and operated by black president to bring § 1981 claim against hospital who allegedly denied contract because of the president's race). For example, in the present case, CSI alleges that it has a racial identity because it is operated and owned by Mr. and Mrs. Gersman, who are both Jewish. Yet the situation would be no different if Gentile shareholders owned CSI and GHA ended the contractual relationship because the corporation had a single Jewish employee. Thus, CSI need not have a "Jewish identity," or even have predominantly Jewish owners or employees, in order to suffer injury from GHA's discriminatory actions.

Therefore, we reject the analysis that a corporation may have standing to assert a discrimination claim only where the corporation has been incorporated expressly for the purpose of furthering minority interests. Because we rest our finding of standing on the fact that the injury suffered by the plaintiff falls within the zone of interests protected by the statute, we need not determine whether a corporation can in fact have a racial identity. While such a determination would be difficult to make, given that a corporation exists as an entity separate from its employees, officers and stockholders, *Moline Properties, Inc. v. Comm'r*, 319 U.S. 436, 439 (1943), the facts as alleged indicate that GHA discontinued its contractual relationship with CSI solely because an individual associated with CSI was Jewish. That inquiry alone is sufficient to meet the Supreme Court's test for standing. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (plaintiff

has standing if it alleges "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief").

To hold otherwise would render a whole range of discrimination claims unlitigable. As the district court correctly found, appellant Gersman was not injured by GHA's actions. It was CSI, and not Gersman, whose contract was terminated. Gersman, as a shareholder, has no standing to bring claims for an injury suffered by CSI. *See Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). However, as to the district court's decision that CSI cannot seek redress solely because it is a corporate, rather than individual entity, we conclude that corporate identity is not dispositive of standing where the corporation suffered injury from allegedly discriminatory acts. Accordingly, we hold that CSI has standing to bring both the § 1981 and the DCHRA § 1-2511 claims in the present case.

B. *Section 1981 of the Civil Rights Act of 1866*

The district court ruled that the complaint in this case failed to state a claim under § 1981 of the Civil Rights Act of 1866. For purposes of reviewing this dismissal, we must accept as true all CSI's factual allegations, and determine whether the district court correctly held that "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957)).

Section 1981 of the Civil Rights Act guarantees to all people the right to "make and enforce contracts" under the equal benefit of the laws. As the district court correctly recognized, the controlling case interpreting the "make and enforce contracts" clause of § 1981 is *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In that case, the Supreme Court interpreted this phrase lit-

erally to mean that § 1981 protects individuals only in the making, or formation, of contracts and in the enforcement of contracts through the legal process. Thus, the Court held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.* at 171.[1] Under this interpretation, "postformation conduct" such as racial discrimination during a contractual term of employment is not governed by § 1981. Accordingly, the Court held that racial discrimination during a contractual term of employment is not violative of § 1981 but is controlled instead by the contractual relationship itself, and should be governed by state contract law and Title VII of the Civil Rights Act. *Id.* at 180-81.

Appellant argues first that *Patterson* does not apply to the present case; that *Patterson* is instead limited to the

---

[1] The dissent cites the plurality opinion by Justice O'Connor in *Jett. v. Dallas Independent School District*, 491 U.S. 701, 711 (1989), and Justice O'Connor's separate opinion in *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1339 (O'Connor, J., concurring) (1990), as support for the proposition that "*Patterson* itself did not decide whether discriminataory contract terminations were actionable under § 1981." Dissent at 1, n.1. However, neither of these cases expressed such reservation. *Jett* simply noted that the defendant school district had not "raised the contention that the substantive scope of the 'right . . . to make . . . contracts' protected by section 1981 does not reach the injury suffered by petitioner here." (*Citing Patterson, supra*, 491 U.S. at 176-77) (omissions in original). Far from expressing misgivings concerning the reach of *Patterson*, Justice O'Connor merely notes that a case decided seven days after *Patterson* rather unsurprisingly did not raise the *Patterson* arguments. Similarly, in her one-paragraph concurrence in *Lytle*, Justice O'Connor notes "that the question whether petitioner has stated a valid claim under § 1981 remains open." *Lytle*, 110 S.Ct. at 1339. However, her reason for noting that it remained open was not that the reach of *Patterson* was uncertain, but that *Patterson* "was decided after the Court of Appeals issued" the decision under review in *Lytle*, so that "the applicability of § 1981 to these claims was not specifically addressed." *Id.*

employment context. It bases this assertion on *Patterson*'s discussion of the complementary relationship between § 1981 and Title VII. *See id.* at 180-84. In determining that § 1981 does not apply to postformation conduct, the Court commented that Title VII's application to racial harassment in the employment relationship "should lessen the temptation for this Court to twist the interpretation of another statute (§ 1981) to cover the same conduct." *Id.* at 181. Thus, appellants argue, because Title VII does not apply outside the employment relationship, *Patterson*'s reasoning necessarily does not apply outside of the employment context.

This argument ignores the plain language of both § 1981 and the *Patterson* opinion. While *Patterson* did, in fact, involve an employment contract, it reached its holding by applying § 1981, a statute that applies to all contractual relationships. Indeed, the Court specifically recognized that "interpreting § 1981 to cover racial harassment amounting to a breach of contract would federalize all state-law claims for breach of contract where racial animus is alleged, *since § 1981 cover all types of contracts, not just employment contracts.*" *Id.* at 183 (emphasis added). Thus, the Court expressly recognized that its holding would be relevant beyond the scope of employment cases. *Cf., e.g., Perry v. Command Performance*, 913 F.2d 99, 101 n.3 (3d Cir. 1990) (rejecting contention that *Patterson* was limited to the employment context); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990) (rejecting contention that § 1981 has broader scope where Title VII remedies are unavailable). Consequently, we conclude that the non-employment context does not affect *Patterson*'s applicability to the present case.

Having determined that *Patterson*'s holding applies outside the employment context, we must now determine whether, under *Patterson*, § 1981 applies to contract terminations. This is an issue of first impression before this

Court. However, other courts of appeal have almost universally interpreted *Patterson* to mean that termination of a contract is not covered by § 1981 because termination constitutes postformation conduct. *See, e.g., Williams v. First Union Nat'l Bank*, 920 F.2d 232 (4th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1225 (6th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 167 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 1991 U.S. Lexis 1469 (U.S. 1991); *Walker v. S. Central Bell Telephone Co.*, 904 F.2d 275 (5th Cir. 1990); *Overby v. Chevron, USA, Inc.*, 884 F.2d 470 (9th Cir. 1989).

One circuit, the Eighth, has held to the contrary. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), *vacated and remanded*, No. 90-324, 1990 U.S. Lexis 1652, 1990 WL 132188 (U.S. Mar. 18, 1991). Although that case was the law of the Eighth Circuit at the time of oral argument in this case, the Supreme Court has since vacated and remanded *Hicks* to the Eighth Circuit for reconsideration in light of the court's pending *en banc* opinion in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990), *reh'g granted* Dec. 11, 1990. In the panel opinion in *Taggart*, the court expressly stated that it agreed with the majority of the other circuits which held that, under *Patterson*, § 1981 does not apply to termination cases. *Id.* at 397. Nonetheless, the *Taggart* court found itself compelled to follow *Hicks* because it remained the governing law of the circuit. The *en banc* review in *Taggart* will of course allow that circuit to reconsider its own precedent.

We agree with the majority of circuits who have held that, under *Patterson*, § 1981 does not apply to contract terminations. We find this conclusion appropriate in terms of the language of both § 1981 and the *Patterson* opinion. The Court was clear in stating that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to

enforce established contract obligations." *Patterson*, 491 U.S. at 171. The Court therefore held that § 1981 does not apply to racial harassment within the contract relationship, or even racial harassment that rises to the level of a breach of contract. *Id.* at 182-83. The Court emphasized that "[c]onduct amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover." *Id.* at 183.

Similarly, the language of § 1981 does not speak of contract terminations. Like breach of contract, a termination "impairs neither the right to make nor the right to enforce a contract." *Id.* A termination necessarily arises after the contract is already made, and, like a breach of contract, is more appropriately dealt with under state contract law.[2]

The dissent argues that this portion is unduly formalistic, rendering meaningless the protections of § 1981 because it "prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to fire that person the next day because of her race." Dissent at 7 (emphasis deleted). The dissent cites as an example of this "formalisim" the Third Circuit's opinion in *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990). In *Perry*, the plaintiff's husband made an appointment for the plaintiff to have her hair styled at the defendant's salon. When the first stylist was unavailable to style the plaintiff's hair, a second stylist refused to do so, stating that she did not "deal with blacks." *Id.* at 100. The Third Circuit held that § 1981 would protect the plaintiff against such discrimination only if it occurred during the making of the contract, and remanded the case for the district court to determine whether the

---

[2] Our dissenting colleague inexplicably insists upon accusing us of "equat[ing] termination of a contract with a breach of contract." Dissent at 1. This we obviously do not do. Rather, like the Supreme Court in *Patterson*, we discuss the effect of broadening § 1981 beyond its terms in relation to both breach and termination.

contract was formed at the time the appointment was made or at the time the hair stylist refused service—a distinction the dissent describes as illustrating the "pitfalls of the timing-related formalism." Dissent at 3. However, the *Perry* Court went on to state that, even if the contract were made at the time the husband made the appointment, such a contract would violate § 1981 if the contract were made on discriminatory terms, *i.e.*, if it were implicit in the contract that the salon would provide services to the petitioner only if she were white. If this were the case, the court concluded that "it would be consistent with *Patterson* to allow plaintiff to proceed with her section 1981 claim." *Id.* at 102.

Here, there is no indication that, at the time the contract was made, an implicit condition of the contract was that Gersman not be Jewish. In the scenarios described by the dissent, however—where an employee is hired one day under the strictures of § 1981 and fired the next—the discrimination would be implicit in the making of the contract as well as the termination. While that situation is not before us, the Third Circuit may well be correct that it would be covered by § 1981 under *Patterson* because the contract would have been made under discriminatory terms. In short, we follow *Patterson* by its terms, and its construction of § 1981 to govern contract formation and enforcement, not all contract-related incidents.

Given this conclusion, we must now discern whether GHA's actions in the present case did in fact "terminate" the contract. Appellants argue that GHA did not terminate the contract, but instead refused to renew the contract for the next month. However, the contract at issue in this case did not require the parties to reach a new agreement at the beginning of every month. Rather, the contract renewed until the parties took an affirmative action to terminate it. *Cf., e.g., Chawla v. Klapper*, 743 F. Supp. 1284 (N.D. Ill. 1990) (contract was terminated

where defendant declined to continue renewal of series of one-year teaching contracts). In this way, the contract resembled an employment-at-will contract.

In the context of an employment-at-will contract, the Seventh Circuit rejected an argument similar to appellant's claim here that each monthly renewal constituted a new contract. *McKnight v. General Motors Corp.*, 908 F.2d at 109. In *McKnight*, the court found that "[e]mployment at will is not a state of nature but a continuing contractual relation. Wages, benefits, duties, working conditions, and all (but one) of the terms are specified and a breach of any of them will give the employee a cause of action for breach of contract." *McKnight*, 908 F.2d at 109 (citations omitted). Similarly, all the terms of the relationship between the parties to the present case were governed by the terms of the original contract.

Appellants base their claim on *Nelson v. School Bd. of Palm Beach County*, 738 F. Supp. 478 (S.D. Fla. 1990). In that case, the district court held that the plaintiff had made out a valid § 1981 action when her contract as a school principal expired and the school district declined to renew her contract for another term as principal, transferring her instead to the position of classroom teacher. Contrary to appellant's interpretation, *Nelson* did not rest its finding of standing simply on the school board's failure to renew the plaintiff's contract, but also on her commensurate demotion. In *Patterson*, the Court recognized that a contractual relationship could change to such a degee that it would constitute a new contract. The Court found that a promotion could be considered a "new" contractual relationship, depending "upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract." *Patterson*, 491 U.S. at 185. A promotion involves such an opportunity "[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* (citation omitted).

Appellants argue that the fact that the parties were free to modify the contract terms governing price, and that, in September, appellants proposed a new price structure that GHA never accepted, establish that the parties had the opportunity to enter a "new" contract at each renewal period. These factors, they argue, indicate that the contract was a "new" contract each month, and that the monthly renewals and modifications should be considered preformation conduct. However, as the district court pointed out, both the renewals and modifications were expressly governed by the terms of the contract—the activities appellants label "preformation" were actually "postformation" actions taken pursuant to the existing contract.

Moreover, CSI's offer of more favorable terms to GHA is insufficient to create a "new" contractual relationship as required by *Patterson*. *See Chawla*, 743 F. Supp. at 1291 (a "new" contract begun each year on the same terms as the prior contract does not fit within the *Patterson* exception). For example, in *Harrison v. Associates Corp. of North America*, 917 F.2d 195 (5th Cir. 1990), the Fifth Circuit held that a promotion did not constitute a new contractual employment relationship because it involved only a small raise, with no "significant change in duties and responsibilities." *Id.* at 198; *see also Green v. Kinney Shoe Corp.*, 728 F. Supp. 768, 777 (D.D.C. 1989) (promotion constituted a "new and distinct" contractual relationship where it involved different responsibilities, as well as a new means of evaluating employee and calculating employee's salary). Because the parties' obligations to one another did not change upon any of the contract "renewals," we conclude that GHA and appellants were engaged in a continuous contractual relationship, and that GHA's actions in this case terminated that contractual relationship.

Thus, as § 1981 does not apply to terminations of contractual relationships, we conclude that appellants fail to

state a claim under § 1981. We therefore affirm the district court's decision to dismiss this action for a failure to state a claim.

C. *District of Columbia Human Rights Act Section 1-2511*

The District of Columbia Human Rights Act guarantees that

> [e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations.

D.C. Code Ann. § 1-2511. Although appellant CSI recognizes that its claims do not fall within the categories listed in § 1-2511, it claims that GHA's actions deprived CSI of the opportunity to participate equally in the economic life of the District of Columbia. Appellant focuses on the phrase "including, but not limited to," as implying that § 1-2511 may be interpreted to include such actions as wrongful termination of a contract.

The district court held that § 1-2511 protects only those activities that are specifically enumerated within the statute. The court rejected appellant's claim that the DCHRA's general protection of an individual's equal opportunity to participate in the economic life of the District prohibited GHA's allegedly discriminatory termination of the contract. According to the court, "deciding what conduct constitutes an impingement of opportunity to participate in the 'economic life' of the District of Columbia" would be to open a "Pandora's box." The court concluded that it was "unwilling[] to assume the role of legislator," and left the phrase "economic life" to be fleshed out by future legislation.

At the time of the district court's decision, there were no opinions by District of Columbia courts to guide the court in interpreting § 1-2511. Since that time, however, two relevant opinions have been released; *Sorrells v. Garfinkel's, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285 (D.C. 1989), and *Justice for Janitors v. Apartment & Office Bldg. Owners Ass'n, Memorandum Opinion and Order*, Civ. No. 88-09695 (D.C. Super. Ct. Dec. 4, 1989). In *Sorrells* the plaintiff argued that her wrongful discharge claim constituted a cause of action under the DCHRA as a whole. The court rejected this claim, noting that the plaintiff did not "rely on any specific provision of the Human Rights Act; rather she asks this court to 'broaden' the policies expressed in the Human Rights Act and to fill a perceived 'gap' in the Act." *Sorrells*, 565 A.2d at 289. The court relied on the absence of language directed toward wrongful discharge actions, emphasizing that the court "cannot rewrite [the Act] or extend its coverage beyond the limits set by the legislature." *Id.* In the court's view, the plaintiff's claim was "an invitation to judicial activism, which we unequivocally decline." *Id.*

Justice for Janitors dealt expressly with the provision at issue in this case, § 1-2511, as well as § 1-2501. In that case, a union of janitors claimed that the defendant association of apartment and office building owners violated the DCHRA by barring union janitors from their property. The court rejected the janitors' argument that "the expansive language of D.C. Code § 1-2501 and 2511 provide the statutory authority for a cause of action for discrimination based on a characteristic not specifically identified in the act." *Justice for Janitors, Memorandum Opinion and Order*, at 11. The court emphasized that § 1-2511 did not create any rights, and that language relating to the Act's purpose was merely "hortatory and without substantive effect." *Id.* at 12.

Because we are interpreting the laws of the District of Columbia, we are obliged to follow the interpretation of the District's own courts. *Hall v. Ford*, 856 F.2d 255, 267 (D.C. Cir. 1988) ("In considering [a] pendant claim, we are of course bound by the law of the District of Columbia, as authoritatively interpreted by the D.C. Court of Appeals."). Moreover, the cases are consistent with the district court's appropriate conclusion that we risk judicial activism by interpreting the phrase, "an equal opportunity to paritcipate fully in the economic . . . life of the District" beyond the scope of those activities specifically enumerated in the statute. Since the District of Columbia courts have declined to extend their interpretation of the statute outside the scope of the enumerated protection activities, we decline to do so as well. We therefore affirm the district court's conclusion that CSI's complaint does not state a claim under DCHRA § 1-2511.

III. Conclusion

For the foregoing reasons, we conclude that appellant CSI, and not appellant Gersman, has standing to bring the present claims. However, we agree with the district court that CSI's complaint fails to state a claim under either 42 U.S.C. § 1981 or DCHRA § 1-2511. The decision of the district court is therefore

Affirmed.

WALD, *Circuit Judge*, dissenting as to Part II.B.: I dissent from the majority's holding that 42 U.S.C. § 1981 does not guarantee freedom from discriminatory contract terminations on the basis of race or creed. I believe that a reasonable interpretation of § 1981's equal "right [] to make [] contracts" necessarily includes the right to be free from discriminatory termination of those contracts and that *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), supports such an interpretation. Accordingly, in my view, the appellants have stated a valid claim under § 1981.

I.

The majority offers two arguments in support of its holding that racially motivated contract terminations are not actionable under § 1981.[1] First, the majority contends that *Patterson* establishes that the scope of § 1981 does not extend to "postformation conduct" and that, therefore, contract termination (which indisputably occurs "postformation") is not actionable under that section. Second, the majority equates termination of a contract with a breach of contract. Since *Patterson* indicated that racial harassment to the point of breach was beyond the scope of § 1981, the majority argues that contract terminations are similarly not actionable under that section. I believe that each of these arguments is infirm.

---

[1] *Patterson* itself did not decide whether discriminatory contract terminations were actionable under § 1981. *See Jett v. Dallas Independent School District*, 109 S. Ct. 2702, 2709 (1989); *Lytle v. Household Manufacturing, Inc.*, 110 S. Ct. 1331, 1339 (O'Connor, J., concurring) (1990). The Seventh Circuit also recognized as much, stating:

> We show no disrespect to the Supreme Court by suggesting that the scope of *Patterson* is uncertain. The glory of the Anglo-American system . . . is that general principles are tested in the crucible of concrete controversies. A court cannot be assumed to address and resolve in the case in which it first lays down a rule every controversy within the semantic reach of the rule.

Malhotra v. Cotter & Co., 885 F.2d 1305, 1312 (7th Cir. 1989).

A.

The majority's "postformation" argument is flawed in two ways. First, the analysis relies on selective quotations from the *Patterson* opinion. Throughout *Patterson*, the Court spoke not simply of "postformation conduct" but more precisely of "postformation conduct by the employer *relating to the terms and conditions of continuing employment.*" 109 S. Ct. at 2374 (emphasis supplied). *See also id.* at 2372 ("problems that may arise later from the conditions of *continuing* employment"); *id.* at 2373 ("postformation conduct [that] implicates . . . the conditions of *continuing* employment"); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1260 (6th Cir. 1990) (Boggs, J., dissenting). Termination, although irrefutably "postformation," does not concern "*continuing* employment"—but rather the very *dis*continuation of employment. The holding of *Patterson* was that harassing conduct in the course of continuing employment was not actionable under § 1981; that case said nothing about the complete termination of employment.

More critically, the majority's argument depends almost entirely on drawing very fine and formal distinctions among three concepts: "refusal to contract," "contract termination," and "refusal to renew a contract"—even when actual events indicate that any or all of these concepts might apply. The majority contends that the first of these (refusal to contract) is always actionable under § 1981; that the second (contract termination) is never actionable; and that the third (refusal to renew) is sometimes actionable. Accordingly, the sometimes-metaphysical distinctions among these three concepts are outcome-determinative.

For example, in this case, CSI heard rumors of Group Health's dissatisfaction with CSI's services and, in mid-September 1987, promptly offered to lower the price for its services. Group Health rejected the offer and, on October 6, 1987, gave notice that it was cancelling its con-

tract with CSI. The majority holds that Group Health's rejection of CSI's new offer was not a refusal to contract but rather the termination of an existing contract. Similarly, the majority holds that Group Health's cancellation of the automatically renewing contract was not a refusal to renew but instead also a contract termination. Therefore, the majority concludes, neither of Group Health's actions falls within the scope of § 1981.

As this scenario indicates, there are two types of formalism at work here. The first is the formalism of classification: for example, was Group Health's rejection of CSI's new offer a (possibly actionable) refusal to renew—or a (never actionable) termination? The survival of CSI's cause of action turns on this characterization. A second and equally Orwellian formalism is implicated by the timing of the parties' actions: under the majority's analysis, if CSI had made a second offer just a few days later—for example, on October 7, *just after Group Health terminated the contract*—then Group Health's rejection of the new offer would presumably have constituted a refusal to contract and would therefore be actionable under § 1981.

The pitfalls of the timing-related formalism are illustrated by the Third Circuit's recent decision in *Perry v. Command Performance*, 913 F.2d 99 (3d Cir. 1990). In that case, Perry's husband telephoned a hair salon to set up an appointment for his wife. The scheduled hairdresser fell ill and Abbott was asked to style Perry's hair. Abbott, however, balked and "responded loudly, "No, no, no, no! I don't do black hair. . . . Oh, no, I'm not going to do your hair, I'm from New Hampshire and I don't deal with blacks.' " *Id.* at 100. The Third Circuit, applying reasoning similar to the majority's, remanded the case to the district court for a finding of when the contract between Perry and the salon was formed. Under this analysis, Perry's § 1981 cause of action turns solely on whether her contract with the salon was made when

her husband set the appointment. If it was, then Abbott's refusal to serve Perry constituted contract termination, and was not barred by § 1981; if, however, a contract for a hair stylist's services is created only when performance begins, then Abbott's action was a refusal to contract, and *was* barred by § 1981.[2]

The real world of contract belies such stark formalisms. In the context of automatically renewing contracts —such as CSI's agreement with Group Health or the standard employment-at-will contract—termination and a refusal to renew are, for all intents and purposes, the same thing. In such situations, it is pointless (or, what is worse, conclusory) to quibble over whether the cancellation of a contract is "preformation" or postformation" conduct—cancellation is *both*: it is both the end of an existing contract and a refusal to enter into a new contract. Despite these realities, the majority's analysis hangs precariously upon such ethereal distinctions. Such formalism, I believe, is both unsound and inappropriate in basic civil rights law.

B.

The majority's second argument is also infirm. *Patterson*, the majority notes, held that harassment—including harassment amounting to a breach of contract—is not actionable under § 1981. The majority likens termination to harassment to the point of breach and concludes that termination is also not actionable under § 1981. *See* Majority opinion ("Maj. op.") at 11. But the majority's analogy is flawed: termination is critically different from both harassment and breach.

As recognized in a range of legal contexts, a contract consists of a bundle of rights. *Cf. Hishon v. King & Spaulding*, 467 U.S. 69, 74-75 (1984); *Perry v. Sinder-*

---

[2] For a further discussion of such anomalies, *see* Burton, *Racial Discrimination in Contract Performance*, 25 Harv. C.R.-C.L. L. Rev. 431, 431-33 (1990).

mann, 408 U.S. 593 (1972). An employment contract, for example, encompasses, *inter alia*, claims to certain wages, benefits, privileges, work conditions, and remedies. Harassment or other discrimination in the performance of a contract deprives the target of one or more of these claims. Even when a party is harassed to the point of breach, she retains her rights under the contract and can enforce the contract under state law. But contract *termination*, in contrast, strips a target of *all* of her claims, of the entire bundle of rights.[3] And in this critical way, termination is different in kind from harassment or breach.

The *Patterson* Court itself made this distinction in holding that, while there would ordinarily be no cause of action for a discriminatory failure to promote, if "the promotion rises to the level of an opportunity for a *new and distinct relation* between the employee and the employer," § 1981 would be implicated. 109 S. Ct. at 2377 (emphasis supplied) (citing *Hishon*). To extend the metaphor, a failure to promote is not actionable under § 1981 if the new position would alter only a few sticks in the bundle (by providing a pay raise, or a new office, or a new title), but rather only if the new position effectively involved an entirely new bundle of rights—such as the move from law associate to partner in *Hishon*. By severing *all* relations between the parties, termination represents an even more dramatic change than a *Hishon*-type promotion and so falls completely outside of *Patterson*'s holding.

This understanding of § 1981's protection against discriminatory termination is also supported by the Supreme Court's ruling on the scope of § 1982, which guarantees all persons equal rights "to inherit, purchase, sell, hold,

---

[3] The majority's suggestion that a "termination . . . is more appropriately dealt with under state contract law," Maj. op. at 11, seems to confuse *termination* with *breach*. Like the plaintiff in this case, most terminated parties in a commercial contract would have *no* state contract law claim.

and convey real and personal property." 42 U.S.C. § 1982.[4] The Court has frequently ruled that § 1982 bars racially-motivated refusals to sell or rent property. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431 (1973). However, in *Memphis v. Greene*, 451 U.S. 100 (1981), the Court indicated that not all infringements on the use of property were within the reach of § 1982. In *Greene*, the city closed the main thoroughfare between an all-white neighborhood and a predominantly black neighborhood. Although the closing was found to "inconvenience" black residents, the Court concluded that such an injury "does not involve any impairment of the kind of property interests that we have identified as being within the reach of § 1982." *Id.* at 124. As in property, so as in contract: although a partial deprivation of equal rights is not actionable, a total deprivation is actionable.

Thus, contrary to the suggestion of the majority, there is a critical difference between breach and termination, between Patterson's harassment and Group Health's rescission: while Patterson retained some rights under her contract, CSI was left with *no* contractual rights whatsoever. Simply put, discriminatory contract termination involves nothing less than the complete *un*making of contracts and thus falls squarely within the scope of § 1981's guarantee of "the same right [to] make [] contracts."

II.

Ultimately, the shortcomings of the majority's analysis stem from its constricted interpretation of § 1981. In

---

[4] Because the "operative language of both § 1981 and § 1982 is traceable to the [Civil Rights] Act of [] 1866," the Supreme Court has suggested that, whenever possible the two sections be given a common interpretation. *Tillman v. Wheaton-Haven Recreation Association, Inc.*, 410 U.S. 431, 439-40 (1973); *see also Shaare Tefila Congregation v. Cobb*, 107 S. Ct. 2019 (1987).

narrowly interpreting § 1981's guarantee to "[a]ll persons [of] the same right . . . to make and enforce contracts" the majority must distinguish "formation" from "termination" and "renewal" and ends up entagle in legal formalisms and distinctions that are analytically unsatisfying.

I would apply a more straightforward interpretation of § 1981. In my view, § 1981's guarantee of "the same right [] to make [] contracts" prohibits persons from refusing to stand in a contractual relationship with another party solely because of that party's race. Whether that refusal takes the form of a refusal to contract, a termination, or a refusal to renew a contract makes no difference. In each case, one party is wholly denied the opportunity to engage in contractual relations on the basis of his race. Interpreting § 1981 in this way, I believe that freedom from racially-motivated termination of a contract is, both practically and logically, an inextricable aspect of the equal right "to make [] contracts." [5]

As a practical matter, if § 1981 prohibits an employer from refusing to hire an applicant because of her race, yet allows the employer to *fire* that person the next day because of her race, then the law's promise of "the same right [] to make [] contracts" is empty. Section 1981 cannot meaningfully be interpreted to distinguish between the employer who says to an applicant face-to-face "I would hire you, but for your race" and the employer who hires a person sight unseen and then, upon meeting him, promptly fires him because of his race. In real-life terms, the employee who is not hired and the employee who is

---

[5] The legislative history of § 1981 strongly supports this understanding of the equal "right [] to make [] contracts." *See Hicks v. Brown Group, Inc.*, 902 F.2d 630, 642-48 (8th Cir. 1990), *vacated*, 1991 U.S. Lexis 1652; *see also* Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541 (1989).

fired end up in precisely the same place: without a job because of the color of their skins.

As a logical matter as well, the equal right to make contracts necessarily encompasses the freedom from racially-motivated contract terminations. Stated broadly, contracts and contract law comprise an effort to reduce future uncertainty in social interaction, to forge predictability by melding the institution of promises and the rule of law. As the opening sentence of Corbin's classic treatise states: "The main purpose of contract law is the realization of reasonable expectations induced by promises." 1 *Corbin on Contracts* § 1 (1963). By enacting § 1981, Congress established that this basic form of power —the power to use legal institutions to reduce uncertainty about the future—must be equally available to persons of all races.[6] Congress' intent is as thwarted by the racially-motivated termination of contracts as it is by the racially-motivated refusal to contract. Either practice denied an individual equal access to contracts and contract law, and either practice is a violation of § 1981.

In sum, like the Eighth Circuit panel whose decision is now pending reconsideration, I conclude that "[t]he right to make contracts would be rendered virtually meaningless unless it encompasses the right to be free from discriminatory deprivations of such contracts." *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 639 (8th Cir. 1990), *vacated*, 1991 U.S. Lexis 1652. Any narrower interpretation of § 1981 is both analytically unsatisfying and morally troubling.

For these reasons, I respectfully dissent.

---

[6] This view of § 1981 makes sense of that section's protection of both the right to "make" and the right to "enforce" contracts. If discriminatory conduct takes place *within* a contract (such as breach or harassment), a plaintiff can seek redress in contract law and § 1981 need only protect the plaintiff's access to the courthouse (the right to "enforce"), if, however, discriminatory conduct fully bars a plaintiff's access to contracts and contract law and deprives her of a contract-law remedy (as does termination), § 1981 creates a more substantive cause of action (the right to "make" contracts).

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 88-1820

ALAN F. GERSMAN, *et al.*,
Plaintiffs,

v.

GROUP HEALTH ASSOCIATION, INC.,
Defendant.

Nov. 13, 1989

David H. Shapiro, Kator, Scott & Heller, Washington, D.C., for plaintiffs.

Anita Barondes, Robert Shea, Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., for defendant.

MEMORANDUM OPINION AND ORDER

REVERCOMB, District Judge.

Plaintiffs Computer Security International, Inc. (CSI) and Alan F. Gersman claim that the Defendant Group Health Association, Inc. violated the District of Columbia Human Rights Act (DCHRA), D.C. Code § 1-2501 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981, by terminating a contract with Plaintiff CSI solely because Plaintiff Gersman, the president and principal stockholder of Palintiff CSI, is Jewish. This matter is before the Court pursuant to Defendant's motion to dismiss Plain-

tiffs' complaint for failure to state a claim and because neither Plaintiff has standing to bring this action. FED. R.CIV. P. 12(b)(6).

A. Statement of Facts

For purposes of a Rule 12(b)(6) motion to dismiss this Court must accept all well-pleaded facts in the Plaintiffs' complaint as true. *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1014 (D.C.Cir. 1988). Plaintiff CSI and Defendant entered into a contract with each other in August 1983 whereby Plaintiff CSI agreed to store Defendant's computer software generated in the course of its business. The contract provided for a one-year term with automatic renewal for successive one-month periods until either Party provided thirty-days notice of termination.[1] The contract further provided that "[f]or renewal terms, notice of adjustment in the fixed charges shall be supplied in writing not less than forty-five (45) days prior to the renewal date at which the charges will take effect." The agreement remained in effect between the Parties as they had originally contemplated until Defendant terminated it in November 1987.

In the latter part of 1986 Mr. Mohammad Ghafori became the operations manager of Defendant's Management Operations System. In August 1987, Mr. Adel Nakhla, an assistant to Mr. Ghafori, met with Plaintiff Gresman and asked him, under the direction of Mr. Ghafori, if Plaintiff Gersman were Jewish to which he answered yes. Prior to the above incident Defendant had consistently expressed its satisfaction with Plaintiff CSI's

---

[1] The contract provided:

> The initial term of this agreement shall be for *1 year* month(s). After expiration of the initial term, this agreement shall automatically renew for successive one month periods until terminated by either party upon receipt of written notice thirty days before the end of these successive periods.

services but after the incident Plaintiff Gersman began hearing rumors that Defendant was dissatisfied. Plaintiff Gersman approached the highest level managers of Defendant who, while admitting that the inquiry about Plaintiff Gersman's heritage had occurred, did not take measures to rectify the situation. On October 6th, 1987, one of Defendant's employees, under the direction of Mr. Ghafori, refused to renew Defendant's contract with Plaintiff CSI.

B. Section 1981

Count II of Plaintiffs' complaint alleges that the Defendant violated § 1981 "by abridging plaintiffs the rights to make and enforce contracts" because Plaintiff Gersman is Jewish.[2] This Court rules that Plaintiffs have failed to state a claim under section 1981 in light of the Supreme Court's recent decision in *Patterson v. McLean Credit Union*, —— U.S. ——, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

In *Patterson*, an employee alleged that her employer had harassed and failed to promote her on the basis of race in abridgment of her right to make and enforce contracts. The Court held that the employe did not have a cause of action on the basis of the alleged harassment under § 1981 because the contracts clause applied only to the formation of contracts and the enforcement of contracts through the legal process. The employer's alleged harassment constituted "postformation conduct . . . relating to the terms and conditions of continuing employ-

---

[2] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the "same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exacations of every kind, and to no other.

ment," *id.* 109 S.Ct. at 2374, which was not within the scope of § 1981:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established including breach of the terms of the contract or imposition of discriminatory working conditions. Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment. . . .

Id. at 2373.

In regard to the employer's alleged failure to promote the employee on the ground of race the Court recognized that in some instances an employer's failure to promote an employee could constitute a refusal to enter into a new contract but cautioned that "[o]nly where the promotion raises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981." *Id.* at 2377.

In the instant case, the Defendant argues that it simply terminated an exising contract with Plaintiff CSI and that its action accordingly constitutes postformation conduct not within the scope of § 1981. The Plaintiffs, on the other hand, contend that the original contract terminated on its own terms after one year and that the Parties subsequently entered into a series of new contracts for one-month terms. Accordingly, the Plaintiffs characterize the Defendant's failure to renew the contract not as a termination of an existing contract but as a refusal to enter into a new contract.

The provision that the contract would be automatically renewed at the end of one year for successive one-month periods unless either Party affirmatively terminated the contract was a result of the negotiations of the Parties

in the first instance. It is illogical to argue that when the automatic renewal provision took effect within the original contemplation of the Parties new and distinct contracts were created. These automatic renewals occurred *precisely because* they were provided for in the contract formed in 1983. The decision of the Defendant to terminate the contract was premised upon and consistent with the terms of the 1983 contract and accordingly constitutes postformation conduct.

The Plaintiffs further contend that each one-month term constituted a new contract because either Party could upon proper notice renegotiate the price term for any given one-month term. The Plaintiffs contend that since the prime term is fundamental to a contract then any opportunity for renegotiation of price necessarily "rises to the level of an opportunity for a new and distinct relation" between the Parties. Again, however, this provision for price negotiation is precisely a term of the original contract upon which the Parties would necessarily have to rely in order to effectuate a change in the price term.

Even if this Court were to accept Plaintiffs' position that the automatic one-month renewals and opportunities to renegotiate the price term result in new and distinct contracts, this Court understands *Patterson* to require more than merely a formal change in the relationship between the Parties premised on state contract law. *See Patterson*, 109 S.Ct. at 2375-76 (the substantive content of § 1981 is clearly independent of the terms of any particular contract and of state contract law). Where the Supreme Court held in *Patterson* that the employer's failure to promote an employee could *in some instances* constitute a failure to make a contract it necessarily was contemplating that the promotion would provide a fundamental and significant change in the status of the employee with the employer; otherwise, the Supreme Court would have held more categorically that *any* failure to

promote the employee would constitute a claim under § 1981. To accept Plaintiffs' position that any opportunity to renegotiate price term constitutes a new contract would be an unreal view of the continuing relationship between the Parties where the only term which was subject to renegotiation was price and the duties and rights of the Parties otherwise remained constant. The Court in *Patterson* has directed that a "lower court should give a fair and natural reading to the statutory phrase 'the same right . . . to make . . . contracts,' and should not strain in an undue manner the language of § 1981." 109 S.Ct. at 2377. The Supreme Court's direction is well-heeded in the instant case.

C. DCHRA

The Plaintiffs concede that the Defendant's termination of its contract with Plaintiff CSI for discriminatory reasons is not covered under any of the specifically cited prohibitions in § 1-2511 of the DCHRA but contend that the D.C. Council did not intend those specific prohibitions to be an exhaustive list. Rather, the Plaintiffs claim, the DCHRA covers any conduct which deprives individuals of their "rights to be free from discrimination in their participation in the economic life of the District of Columbia." *Plaintiffs' Complaint* ¶ 20. Plaintiffs have cited no caselaw to support their position and both Parties agree that the issue—whether conduct which is not specifically enumerated under the DCHRA can nonetheless be prohibited if a court finds that the conduct impinges upon an individual's equal right to fully participate in the "economic life" of the District of Columbia—is one of first impression.

Section 1-2511 provides:

> Every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District and to have an equal opportunity to participate in all aspects of life, in-

> cluding, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational instiutions, in public service, and in housing and commercial space accommodations.

Although the "including, but not limited to" language of this section at first blush suggests that the enumerated prohibitions are not exclusive under the DCHRA, this Court finds that when the sections of the statute are analyzed not in isolation but as they relate to each other it is manifestly clear that the D.C. Council was legislating only against the discriminatory conduct specifically enumerated in § 1-2511.

Under the doctrine of *ejusdem generis* specific language governs over general language. *See Vann v. District of Columbia Bd. of Funeral Directors and Embalmers*, 408 A.2d 688, 695 (D.C. 1984). This doctrine is all the more compelling when § 1-2511 is read in relationship to the other sections within Subchapter 11 of the DCHRA entitled *Prohibited Acts of Discrimination.* For every enumerated prohibition in § 1-2511 the D.C. Council specifically enacted in subsequent sections detailed legislation on that prohibited conduct. In separate and distinct sections following § 1-2511 the DCHRA prohibits discrimination in employment, § 1-2512, real estate transactions, §§ 1-2515, 1-2516, 1-2517, public accommodations, § 1-2519, educational institutions, § 1-2520, and the sale of motor vehicle insurance. § 1-2533. Thus, the D.C. Council specifically was aware of specific conduct that it wanted to prohibit in § 1-2511 and provided subsequent sections to cover that conduct while providing no legislation on what constitutes conduct that would otherwise be prohibited under the general rubric of "economic life." *See Vann v. Bd. of Funeral Directors and Embalmers*, 480 A.2d at 695 (general language of introduction refers only to conduct as listed in subsequent subsections of the statute); *see also Air Transp. Ass'n v. Federal Energy Office*, 382 F.Supp. 437, 445 (D.D.C.

1970), *aff'd*, 520 F.2d 1339 (Temp.Emer.Ct.App.1975); *Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n. 2 (D.C.Cir.1973); *accord Council of Hawaii Hotels v. Agsalud*, 594 F.Supp. 449, 453 (D.Haw.1984) ("A general statutory section setting forth legislative policy and purpose neither constitutes an operative section of the statute nor prevails over more specific provisions").

This Court is unable from the statute to determine what conduct the D.C. Council possibly could have intended to prohibit when it used the general language "economic life" in the introductory section of Subchapter II. This court is unwilling to open the Pandora's box in deciding what conduct constitutes an impingement of opportunity to participate in the "economic life" of the District of Columbia. Plaintiffs in essence are requesting that this Court act as a legislator which, respectfully, is a job more appropriate for the D.C. Council. The D.C. Council is in the better position to determine not only what conduct specifically impinges upon an individual's right to participate in the "economic life" of this city but, more fundamentally, whether all such conduct should be prohibited. This Court notes that even in areas in which the D.C. Council has specifically prohibited discrimination it has nonetheless provided for exceptions after determining that legitimate grounds exist in some instances to permit discriminatory conduct. *See* § 1-2513 (exceptions in employment for seniority systems and officer cadet programs); § 1-2518 (exceptions in housing for owner-occupied buildings); § 1-2521 (sex and age exceptions in educational institutions for private undergraduate and primary schools).

This Court's unwillingness to assume the role of legislator is all the more necessary where the D.C. Council has provided the D.C. Office of Human Rights with the mandate to investigate discrimination in accordance with the statements of purpose in §§ 1-2501 and 1-2511 for the *express reason* of "making appropriate recommendations

for action, including legislation, against such discrimination." D.C. Code § 1-2541(b). Where the statutory scheme establishes an executive agency to investigate and recommend whether the D.C. Council should enact future legislation to prohibit certain discriminatory conduct in accordance with § 1-2511 and D.C. Council obviously could not have intended that discrimination in all aspects of economic life was covered under the statute; otherwise, § 1-2541(b) would be gratuitous.

D. Standing

Even if the Plaintiffs were able to state a cause of action under § 1981 or the DCHRA, the Plaintiffs would not be able to proceed with these claims on the ground that they both lack standing.

1. Plaintiff Gersman

Plaintiff Gersman concedes that he has no standing to redress an injury to Plaintiff CSI under § 1981 even though he is its president and principal shareholder. *See Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir.1981) (officers and shareholders cannot maintain action under Civil Rights Act of 1871, 42 U.S.C. § 1983, on behalf of corporation); *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir.1969) (president and general manager of corporation who, with his wife, owned all the stock of corporation could not maintain action under 42 U.S.C. § 1983 to redress injury to corporation); *T & S Serv. Assocs., Inc. v. Crenson*, 505 F.Supp. 938, 943 (D.R.I.) (sole shareholder of corporation had no standing to maintain action under section 1981 to address injury to corporation), *vacated and remanded on other grounds*, 666 F.2d 722 (1st Cir.1981). Plaintiff Gersman nonetheless contends that he had standing to sue for his own injuries, namely, humiliation, that he suffered as a witness to Defendant's termination of the contract with Plaintiff CSI. However, Plaintiff CSI suffered the discriminatory

conduct, or injury in fact, and not Plaintiff Gersman. There is no action under either section 1981 or the DCHRA for third parties who suffer emotional injury after witnessing discriminatory conduct to others regardless of the nature of the relationship between the witness and the injured party.

2. Plaintiff CSI

Defendant contends that Plaintiff CSI does not have standing to sue under the DCHRA and § 1981 because corporations are legal entities separate and distinct from the religious and racial identities of the individuals who comprise the corporation. Plaintiff CSI argues that because the corporation is closely held by Plaintiff Gersman and his wife the identity of the corporation is therefore Jewish. The case-law is split in the lower courts on whether a corporation can possess the identity of its members for purposes of a cause of action for discrimination.

In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), the Supreme Court stated that "a corporation . . . has no racial identity and cannot be the direct target of the alleged discrimination." *Id.* at 263, 97 S.Ct. at 562. Although, as both Parties recognize, this language is dicta, the statement does not stand in jurisprudential isolation but is predicated on the long-standing recognition that a corporation is a creation of state law with the intent that it have an identity separate and distinct from that of its members or organizers. *See Moline Properties v. Commissioner*, 319 U.S. 436, 439, 63 S.Ct. 1132, 1134, 87 L.Ed. 1499 (1943). Accordingly, this Court declines to treat the language as dicta and rules, as have other lower courts interpreting *Village of Arlington Heights*, that a corporation can have no religious or racial identity. *See, e.g., Triad Assocs., Inc. v. Chicago Hous. Auth.*, 1988 WL 6667, 1988 LEXIS 582, No. 87 C 5096 (N.D. Ill. Jan. 27, 1988).

Even if a corporation could assume the racial or religious identity of its members, this Court would still rule that Plaintiff CSI did not have standing to bring this action. In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir.1982), the court held that a corporation possesses a racial or religious identity to have standing to bring an action for racial discrimination under 42 U.S.C. §§ 1981 and 1983 only where a functional nexus exists between the purpose of activity of the corporation and the identity of the members of that corporation. *Id.* at 705-06. In *Hudson Valley Freedom Theater, Inc.*, the plaintiff was a nonprofit corporation "established for the very purpose of advancing minority interests," *id.* at 706, specifically, promoting black and Hispanic culture.

In the instant case, Plaintiff CSI is merely a vehicle by which Plaintiff Gersman has chosen to earn his living and the corporate purpose is independent of Plaintiff Gersman's religious faith or racial identity. In other words, Plaintiff CSI does not serve to advance Plaintiff Gersman's racial or religious identity but simply his economic interests. Although other courts have found that a corporation can have a racial or religious identity by the mere fact that it is owned or controlled by members of a protected class, *see e.g., T & S Serv. Assocs. v. Crenson*, 505 F.Supp. at 943; *Howard Sec. Servs., Inc. v. Johns Hopkins Hosp.*, 516 F.Supp. 508, 513 (D.Md.1981), this Court finds them unpersuasive.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss Plaintiffs' complaint is GRANTED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Before: Wald, Buckley and Sentelle, Circuit Judges

ORDER

[Filed July 5, 1991]

Upon consideration of appellants' petition for rehearing, filed June 6, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5482

ALAN F. GERSMAN, *et al.*,
Appellants

v.

GROUP HEALTH ASSOCIATION, INC.

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

[Filed July 5, 1991]

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

A statement of Circuit Judge Wald is attached.

Wald, Circuit Judge

As expressed in my dissent to the panel opinion, I believe that the majority has over-interpreted *Patterson v. McLean Credit Union* to bar a section 1981 action by a plaintiff whose contract is terminated for discriminatory reasons and whose bid for a new contract is simultaneously rejected for the same reasons. However, because several other circuits have made similar rulings, I believe we would only add to the disarray by en bancing the case. The Supreme Court needs to revisit the scene in the interests of doctrinal coherence and fundamental equity.

SUPREME COURT, U.S.
FILED
MAR 15 1993
OFFICE OF THE CLERK

No. 92-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

ANITA BARONDES
Counsel of Record
PETER CHATILOVICZ
RONALD A. LINDSAY
CHRISTOPHER A. WEALS
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

QUESTION PRESENTED

Whether Section 101 of the Civil Rights Act of 1991, which was enacted to expand the scope of 42 U.S.C. § 1981, applies retroactively to cases pending on appeal on the Act's effective date.

STATEMENT REQUIRED BY RULE 29.1

Group Heath Association, Inc. has no publicly-owned parent, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.1	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
I. THERE IS NO SIGNIFICANT CONFLICT AMONG THE FEDERAL APPELLATE COURTS	3
II. THERE IS NO MERIT IN PETITIONERS' SUGGESTION THAT THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW MISAPPLIED RELEVANT LAW	6
III. THE JUDGMENT BELOW MAY BE AFFIRMED ON OTHER GROUNDS	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Ayers v. Allain, 893 F.2d 732 (5th Cir. 1990), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *vacated and remanded on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992) 8
Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) 3, 5
Beaulieu v. United States, 110 S. Ct. 3302 (1990) .. 6
Bennett v. New Jersey, 470 U.S. 632 (1985) 5
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 4, 5
Bradley v. Richmond School Board, 416 U.S. 696 (1974) 4, 5
Condit v. United Air Lines, Inc., 631 F.2d 1136 (4th Cir. 1980) 8
Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) 3, 4, 5
Davis v. City and County of San Francisco, No. 91-15113, 1993 WL 23765 (9th Cir. Feb. 5, 1993) 3
Estate of Reynolds v. Martin, No. 91-15237, 1993 U.S. App. LEXIS 1974 (9th Cir. Feb. 9, 1993) .. 3, 4, 6
Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 3
General Electric v. Gilbert, 429 U.S. 125 (1976) 8
Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, No. 92-938 (Feb. 22, 1993) 9
Holt v. Michigan Dep't of Corrections, 974 F.2d 771 (6th Cir. 1992) 3
Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992) 3, 5
Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992) 3
Lussier v. Dugger, 904 F.2d 661 (11th Cir. 1990) .. 7, 8
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Sikora v. American Can Co., 622 F.2d 1116 (3d Cir. 1980) 8
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 9
Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 9

STATUTES AND RULES

42 U.S.C. § 1981 ..... *passim*
Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) ..... *passim*
Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) 6, 7
D.C. Code § 1-2511 2
Supreme Court Rule 10 ..... 4, 7

OTHER AUTHORITIES

1A N. Sands, *Sutherland Statutory Construction* (4th ed. 1985) 8
Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1190

ALAN F. GERSMAN, *et al.*,
Petitioners,

v.

GROUP HEALTH ASSOCIATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves the termination of a commercial service contract between respondent Group Health Association, Inc. ("GHA") and petitioner Computer Security International, Inc. ("CSI"). In August 1983, GHA entered into a contract with CSI for the off-site storage and retrieval of GHA's computer tapes. The initial term of the agreement was one year. Thereafter, the contract would automatically renew for successive one-month periods until either party terminated it on thirty days notice. Pet. App. 90a. The agreement remained in effect on its original terms (except for price adjustments) until October 1987, when GHA notified CSI that it was terminating the contract.

CSI and Gersman subsequently brought this action against GHA alleging that the contract was "cancelled and not renewed" because Gersman is Jewish. CSI and Gersman contended that the contract termination violated both § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1990), and § 1-2511 of the District of Columbia Human Rights Act ("DCHRA"), D.C. Code § 1-2511 (1991).

The district court dismissed both counts of the complaint for lack of standing and failure to state a claim. Pet. App. 91a-99a. The court of appeals, while disagreeing that CSI lacked standing (Pet. App. 65a-70a), affirmed the dismissal of the case on the grounds that Gersman and CSI failed to state a claim under § 1981 or the DCHRA. Pet. App. 70a-80a. With respect to the federal statute, the court agreed with all of the other federal circuits, holding that, under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), § 1981 does not cover contract terminations. Applying that principle to the facts before it, the court held that GHA's actions, whether characterized as a termination of or a failure to renew the contract, were "postformation conduct" as defined in *Patterson*.

After the court of appeals' judgment, but while petitioners' original petition for certiorari was pending before this Court, Congress enacted the Civil Rights Act of 1991. The Act included a provision expanding the protections afforded by § 1981. In particular, Section 101 of the Act provided that the discriminatory termination of contracts would be prohibited by § 1981. On January 27, 1992, this Court granted the writ of certiorari and remanded the case to the court of appeals for consideration of the effect of the Civil Rights Act of 1991 on the legal sufficiency of petitioners' claims.

On remand, the court of appeals held that Section 101 does not apply to cases pending on appeal when the Act went into effect, concluding that "[t]he rights of the

parties must be adjudicated as they were under the law prevailing at the time of the contract." Pet. App. 30a. Accordingly, the court affirmed its previous dismissal of petitioners' claims.

REASONS FOR DENYING THE WRIT

I. THERE IS NO SIGNIFICANT CONFLICT AMONG THE FEDERAL APPELLATE COURTS

Petitioners' principal argument is that a conflict exists in the circuits regarding the retroactivity of the Civil Rights Act of 1991. Petitioners characterize the circuits as "splintered." Pet. 5.

Petitioners' assertion of an inter-circuit conflict is untenable in this particular case. On the retroactivity of Section 101 of the Act—the only provision of the Act at issue in this case—the circuits are united in their holdings. Every court of appeals that has considered the question has agreed with the court below and ruled that Section 101 is to be applied prospectively only. *E.g.*, *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

Petitioners predicate their claim of a conflict among the circuits on a decision by the Ninth Circuit in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). Pet. 6. After the instant petition for certiorari was filed, the Ninth Circuit vacated that portion of the *Davis* opinion that addressed the Act's retroactivity. *Davis v. City and County of San Francisco*, No. 91-15113, 1993 WL 23765 (9th Cir. Feb. 5, 1993) (vacating as moot that portion of the opinion applying Section 113 of the Civil Rights Act of 1991).

It is true that the Ninth Circuit has recently issued another decision, *Estate of Reynolds v. Martin*, No. 91-

15237, 1993 U.S. App. LEXIS 1974 (9th Cir. Feb. 9, 1993), holding that one section of the Act is retroactive, but the section of the Act at issue in *Estate of Reynolds*—Section 114(2)—does not address substantive rights and liabilities. To the contrary, Section 114(2) of the Act merely provides that pre- and postjudgment interest will be available to federal employees claiming discrimination to the same extent that such interest is available "in cases involving nonpublic parties." Pub. L. No. 102-166, 105 Stat. 1071 (1991). Because *Estate of Reynolds* and the numerous decisions holding that Section 101 is not retroactive address different and radically dissimilar provisions of the Act, they cannot be said to be in "conflict on the same matter." Supreme Court Rule 10.1(a).[1]

This difference in focus between the two Ninth Circuit decisions which have concluded that certain remedial provisions of the Act are retroactive and the federal appellate decisions which have all concluded that Section 101's creation of additional substantive rights and liabilities should not be applied retroactively shows that there is no real conflict among the federal courts of appeals. It also undercuts completely petitioners' suggestion that there is grave confusion among the lower courts about "this Court's jurisprudence on the presumptions to apply when congressional intent [concerning the retroactivity of a statute] is not clear." Pet. 5. The court below, along with other appellate courts, has not found this Court's reasoning impenetrable. After carefully considering the pertinent decisions of this Court, the District of Columbia Circuit recognized that the apparent tension between decisions such as *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), which read broadly might suggest that there is a presumption that statutes apply retroactively, and *Bowen v. Georgetown University Hos-*

[1] Significantly, the vacated *Davis* decision likewise did not hold that any provision of the Act affecting substantive rights and liabilities is retroactive. The section of the Act at issue in *Davis*, Section 113, provides for the award of expert witness fees.

pital, 488 U.S. 204 (1988), which states that statutes are presumed to apply prospectively only, may be resolved by a closer scrutiny of this Court's decisions. In particular, the court below was informed by this Court's decision in *Bennett v. New Jersey*, 470 U.S. 632 (1985).

Bennett held that substantive provisions of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241(a), *et seq.*, could not be applied retroactively. *Bennett* sharply distinguished *Bradley* by observing that *Bradley* involved the retroactivity of a remedial provision, specifically, a provision authorizing the allowance of attorney's fees. *Bennett* reasoned that because the *Bradley* Court was limited to the consideration of a remedial provision, the holding in *Bradley* did not depart from the "venerable rule of statutory interpretation, *i.e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 639.

The court below concluded that *Bennett* provided the means for reconciling *Bradley* and *Bowen*: "The *Bowen* presumption must apply in the case of changes in substantive law," while *Bradley* would govern the application of remedial procedural provisions. Pet. App. 26a-27a. In this conclusion as to the applicability of the *Bradley* and *Bowen* presumptions, the court below has been joined by the Eleventh and Fifth Circuits. *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370, 1374 (11th Cir. 1992); *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1373-74 (5th Cir. 1992).

Accordingly, the rulings that petitioners tendentiously characterize as evidence of a split in the circuits occasioned by misunderstanding of this Court's decisions, actually exemplify the consistent application of this Court's decisions to differing types of statutory provisions. The actual holdings of the numerous appellate courts that have concluded that Section 101 is not retroactive do not diverge from the Ninth Circuit's decisions in *Davis* (now

vacated) and *Estate of Reynolds*, which held certain remedial provisions of the Act retroactive. There is no conflict among the federal appellate courts that warrants intervention by this Court.[2]

II. THERE IS NO MERIT IN PETITIONERS' SUGGESTION THAT THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW MISAPPLIED RELEVANT LAW

Implicitly conceding that their contention that there is a conflict among the circuits might not be found persuasive, petitioners urge the Court to grant their petition on the ground that "legislation designed to nullify a decision of this Court" is "generally applied . . . to cases pending upon enactment." Pet. 10, 11. In support of this ostensible maxim of statutory interpretation, petitioners cite decisions interpreting the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988). Pet. 11. Petitioners then argue that because Congress enacted Section 101 "to disavow" this Court's decision in *Patterson* "and to restore 42 U.S.C. § 1981 to its pre-*Patterson* state," the court below erred in not applying Section 101 retroactively.[3]

---

[2] Even if one characterizes as a "conflict" the differing analyses of statutory retroactivity offered in dicta by the Ninth Circuit and the other federal appellate courts, the petition should not be granted. A conflict among the federal appellate courts is often a necessary but never a sufficient precondition for review by this Court. "[I]t . . . regularly happens that certiorari is denied in other cases presenting" conflicts. *Beaulieu v. United States*, 110 S. Ct. 3302 (1990) (Justice White dissenting from denial of certiorari). Particularly in cases in which an issue of statutory interpretation will become moot through the passage of time, the Court has been reluctant to grant certiorari. *See* Robert L. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 470 (1953). Here, of course, the issue of the Act's retroactivity will affect only a finite number of cases and will be moot once these cases have been processed through the courts.

[3] This argument by petitioners appears to be an argument on the merits, and it is unclear why petitioners regard it as advanc-

However, although there is no dispute that a majority of Congress was dissatisfied with the result in *Patterson*, the plain language of the Act belies the claim that Section 101 seeks "to restore" the law to its pre-*Patterson* state. The statement of the Act's purpose relevant to Section 101 is found in Section 3(4) of the Act, which unambiguously provides that the Act is designed, in pertinent part:

> to respond to recent decisions of the Supreme Court *by expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added). Congress intended to, and did, *expand* the scope of 42 U.S.C. § 1981. Congress intended to, and did, create new substantive rights and liabilities. The Act's statement of purpose is by itself sufficient to remove the linchpin of petitioners' argument.

In stark contrast to the express intent of Congress to expand the scope of 42 U.S.C. § 1981, Congress in enacting the Civil Rights Restoration Act included in Section 2 of that statute explicit language confirming its intention "to restore the prior consistent . . . interpretation" of Title VI of the Civil Rights Act of 1964. Thus, Congress unmistakably indicated that the Civil Rights Restoration Act was, as its very title implies, "restorative," not expansive, and the appellate courts that applied this statute retroactively relied on this explicit statement of congressional intent. *Lussier v. Dugger*, 904 F.2d

---

ing a reason why the petition should be granted. None of the decisions that petitioners cite in support of their maxim of statutory interpretation are decisions of this Court. *Cf.* Supreme Court Rule 10.1(c) (a consideration weighing in favor of review by the Court is a conflict between the ruling of a federal appeals court on an important question of federal law and "applicable decisions of this Court.").

661, 666 n.6 (11th Cir. 1990); *Ayers v. Allain*, 893 F.2d 732, 755 (5th Cir.), *vacated on other grounds*, 914 F.2d 676 (5th Cir. 1990), *vacated and remanded on other grounds sub nom. United States v. Fordice*, 112 S. Ct. 2727 (1992). Clearly, the absence of such a statement of congressional intent in the Civil Rights Act of 1991 renders these cases inapposite.

Furthermore, contrary to the petitioners' assertion that "nullifying" legislation is generally applied retroactively, there are numerous decisions applying statutes that were enacted to change this Court's interpretation of the law in which these statutes were not applied retroactively. *E.g., Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1139-40 (4th Cir. 1980) (Pregnancy Discrimination Act, designed to change this Court's interpretation of relevant law in *General Electric v. Gilbert*, 429 U.S. 125 (1976), does not apply retroactively); *Sikora v. American Can Co.*, 622 F.2d 1116, 1121 (3d Cir. 1980) (amendments to Age Discrimination in Employment Act directed at Supreme Court interpretation do not apply retroactively). The canon of statutory construction that these cases reveal is not the counterfeit one proffered by petitioners, but rather the following time-honored rule: "The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature determines to be inaccurate. Where such statutes are given any effect, the effect is prospective only," 1A N. Sands, *Sutherland Statutory Construction* § 27.04 (4th ed. 1985).

As Congress plainly stated that Section 101 of the Act expanded existing civil rights protection, the only rationally defensible conclusion is that Section 101 is to be applied prospectively only. Petitioners have not provided any cogent argument for granting their petition.

III. THE JUDGMENT BELOW MAY BE AFFIRMED ON OTHER GROUNDS

After the filing of the instant petition and respondent's preparation of its brief in opposition, the Court granted the petition in *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted sub nom. Rivers v. Roadway Express, Inc.*, No. 92-938 (Feb. 22, 1993). Respondent respectfully submits that the foregoing arguments retain their validity.

In any event, there is an additional reason why the Court should deny the petition. As the district court originally held, petitioners not only fail to state a claim, but they also lack standing to pursue their claims. Pet. App. 97a-99a. The injury, if any, in this case was suffered by petitioner CSI, not its president Gersman. *Id.* As to CSI, the district court concluded that this corporation could not maintain an action for discriminatory termination of a contract because it had no racial or ethnic identity. The district court relied on this Court's ruling in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977), in which the Court stated that "a corporation . . . has no racial identity and cannot be the target of the alleged discrimination." The court of appeals disagreed, concluding that CSI (but not Gersman) did have standing. Pet. App. 65a-70a.

Respondent submits that the district court properly interpreted this Court's decisions in finding that the corporation, CSI, lacked standing to pursue a claim under § 1981. Accordingly, petitioners' lack of standing presents an alternative basis for denying the petition. *See, e.g., Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was . . . rejected . . . by the District Court or the Court of Appeals").

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANITA BARONDES
Counsel of Record
PETER CHATILOVICZ
RONALD A. LINDSAY
CHRISTOPHER A. WEALS
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
Suite 500
815 Connecticut Ave., N.W.
Washington, D.C. 20006-4004
(202) 463-2400
Attorneys for Respondent